

## **To Hell On the Railroads: Why Our Technology and Law Encourage a Degrading Culture**

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In olden days a glimpse of stocking  
 Was looked on as something shocking,  
 Now Heaven knows, anything goes.  
 Good authors too who once knew  
   better words  
 Now only use four-letter words, writing  
   prose  
   Anything goes.  
 The world has gone mad today  
                   And good's bad today  
                   And black's white today  
                   And day's night today . . .  
                   Anything goes.<sup>1</sup>

## I. INTRODUCTION

### A. PURPOSE AND ORGANIZATION

This interdisciplinary essay has two related purposes. First, it considers yet again the ancient "Railroad Problem"<sup>2</sup> - Why did people hate the railroads? "How was it that an innovation as clearly revolutionary as the steam railway in its potential to do so many things better . . . came to be 'despised and rejected' by a politically contentious people who made it the chief scapegoat of their discontents? Why did the making of basic business decisions become a matter for political rather than economic resolution on the railroads?"<sup>3</sup>

The reason people hated the railroads was that railroads destroyed pre-industrial civilization and replaced what was with what is - a civilization increasingly highly offensive and full of discontents. This paper argues that the railroads, the great engine of modernity, the first major

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1. COLE PORTER, *Anything Goes* (1936).

2. It is a measure of how far railroads have fallen in importance that in our daily discourse we no longer understand what is meant by "the railway problem." It has been, at least, a very common and commonly-used expression. Writers used to assume their readers were familiar with the term. Lewis Haney starts his long history of the railroads as follows: "Without attempting to define the railway problem, it may be broadly stated that this problem is a social one: whether it be regarded as one of relatively reasonable rates or of absolutely reasonable rates, the welfare and best development of society are the end and solution of the matter." LEWIS HENRY HANEY, *A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES TO 1850* 9 (1908). Albro Martin begins his book this way: "To a person reaching adolescence in the 1930s, the nature of the 'American Railroad Problem' was all too clear [the roads had hit hard times in the Depression] . . . . But I soon learned that there had always been a Railroad Problem." ALBRO MARTIN, *ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF AMERICAN RAILROADS, 1897-1917* xi (1971).

3. ALBRO MARTIN, *RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, AND REBIRTH OF A VITAL AMERICAN FORCE* vii (1992).

flowering of post-Enlightenment industrial civilization,<sup>4</sup> promoted in the 19th Century a cultural and ethical system so offensive and destructive that it was “the Problem” for one hundred years. The observation is not entirely uncommon.<sup>5</sup> It is less common to view railroad regulatory legislation (so-called “granger laws”) as a response to a cultural problem, as opposed to an economic, problem.<sup>6</sup> Views that laws were “a matter for political rather than economic resolution” are not unreasonable. Indeed, it may be argued that railroad regulation was *too much* an economic resolution, and not enough of a political, cultural, or ethical one; what regulation should have done was respond to offensive modern industrial culture and its concomitant ethical system. Because the parties interested in regulation addressed economic aspects of the problem (muddled no doubt by politics), they failed to deal completely - then or now - with the larger problem; it is no wonder that the regulation was not considered successful (it ruined the railroads).

Second, this paper insists that our “Modern Problem” is derived from the Railroad Problem, that much of our capitalistic ethos is baleful junk, a vast social disaster; it is unsustainable. We cannot go on this way, measuring our progress by the number of new housing starts. The Railroad Problem was a consequence of post-Enlightenment civilization, a precursor and microcosm of our Modern Problem. The same ethical and legal system developed by or through the railroads tolerates, indeed encourages, junk and destructiveness today. This essay points toward a line of analysis that might encourage new thinking toward our salvation.

To these purposes, following this introduction (which substantiates the Railroad and the Modern Problem) this paper briefly reviews how 18th Century *philosophes* in France ended Western Civilization’s old order by liberating humans from the shackles of tradition. It traces the effect the Enlightenment had during the next century in the development of modernism, capitalism and industrialism and considers how our 20th

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4. There is a vast literature on the railroad, some of which is cited in this paper; there are hundreds of books referred to in the bibliographies accompanying the sources.

The machine fascinates on many levels, but really what is most striking is that the railroads were the first. They were the first instrumentality of modern industrialism that affected most people; they changed the world from what we would consider “old fashioned” to what we would recognize as modern. They were the first in modern management, first in modern tort law, first in labor law, first in modern accounting, first in government regulation, first in modern industrialism. The problems created by modern industrialism were first experienced with the railroads. We have had longer to consider our responses to this machine than we have to any other, and because it was the first, huge attention has been devoted to it. And it remains fascinating.

5. Just as Haney suggested, the Problem involved “the welfare and best development of society.” HANEY, *supra* note 2.

6. “It does not capture the cultural meaning of [antitrust] laws to describe them in purely economic terms.” LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 66 (1990).

Century culture, with its emphasis on personality and consumption, grew out of the 19th Century's emphasis on character.

B. TO HELL ON THE RAILROADS: THE "RAILROAD PROBLEM" AND THE MODERN PROBLEM

Certainly there was a Railroad Problem - indeed, objection to the railroads caused major civil disturbances in the late 19th Century. People rioted in the streets. In 1887, West Virginia railroad workers first rose up against perceived railroad abuses. Local militia, called out at the governor's request, sided with the workers. The strike spread all across the county. In Pittsburgh, howling mobs besieged the state militia in a roundhouse and destroyed more than \$5 million worth of property; violent unrest spread to Buffalo, Chicago, St. Louis, Omaha, St. Paul, and San Francisco. First the police were overwhelmed. Then the militia, and finally the regular Army was called out, and it had to be backed up by Civil War veterans: ten thousand of them were needed to reopen the Pennsylvania Railroad<sup>7</sup>. Uncontrolled, the railroads were, or were perceived to be, ruining farmers, laborers, the polity, and the roads.

Now we are confronted with a Modern Problem, a ruination thrown up by the same revolutionary forces that made the railroads 150 years ago and to which they contributed vastly. This Modern Problem *is* perceived to be more cultural than was the railroad ruination, but for the most part the "legitimate" tools we use to address it (antitrust laws) are the same ones that were developed one hundred years ago to curb the railroads. Those tools were an incomplete response then, and they are still. We are loathe to apply any tools to the *real* problem - the business driven imposition of a degraded and degrading culture.

In January of 1997, Mark Halprin described the legal-cultural revolution of the last twenty-five years as one

in which individual rights have become group rights, in which responsibility has become entitlement, marriage has become divorce, birth has become abortion, medicine has become euthanasia, homosexuality is a norm, murder is neither a surprise nor necessarily punishable, pornography is piped into almost every home, gambling is legal, drugs are rife, students think Alaska is an island south of Los Angeles, and mothers of small children are sent off to war with great fanfare and pride.<sup>8</sup>

Halprin - hyperbole notwithstanding - seems reasonably accurate. He might have added some further observations about our culture's physical manifestations:

[S]omething is wrong with the places where we live and work and go about

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7. SEE *INFRA* note 44.

8. Mark Halprin, *To Fight for Principle*, WALL ST. J., Jan. 15, 1997, at A16.

our daily business . . . . We drive up and down the gruesome, tragic suburban boulevards of commerce, and we're overwhelmed at the fantastic, awesome, stupefying ugliness of absolutely everything in sight - the fry pits, the big-box stores, the office units,<sup>9</sup> the lube joints, the carpet warehouses, the parking lagoons, the jive plastic townhouse clusters, the uproar of signs, the highway itself clogged with cars - as though the whole thing had been designed by some diabolical force bent on making human beings miserable. And naturally, this experience can make us feel glum about the nature and future of our civilization . . . . This ugliness is the surface expression of deeper problems - problems that relate to the issue of our national character.<sup>10</sup>

Helprin is hopelessly defending last ditches. In November of 1996, California and Arizona voted to legalize the use of marijuana for medical purposes (Washington State rejected a similar initiative in November 1997, but a narrower version was approved in November 1998); Massachusetts' Department of Health was set, in January 1997, to promulgate regulations for the drug's medical use in that state.<sup>11</sup> General decriminalization is probably in the future. The state of Hawaii is well on its way to recognizing homosexual marriages.<sup>12</sup> As to abortion,

The battle . . . is over, and the pro-choicers have won. Leading Republicans were so desperate to avoid the subject [in 1996] that they claimed not to have read their own platform. The current pro-life strategy of concentrating on so-called partial-birth abortion shows that the basic right to choose abor-

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9. The reason that office units are ugly "boxy, nondescript buildings . . . 'toilet-paper buildings because you just [pull] them off the roll'" is because it is cheaper that way. Ann Carnns, *Office Workers Rub Elbows as More Workplaces Shrink*, WALL ST. J., May 7, 1997, at B1.

10. James Howard Kunstler, *Home From Nowhere*, ATLANTIC MONTHLY, Sept. 1, 1996, at 43.

11. *Massachusetts Moves to Legalize Marijuana*, THE BELLINGHAM HERALD, Jan. 21, 1997, at A3. Five states voted by initiative to allow the medical use of marijuana in the November 1998 elections.

12. Linda Hosek, *Reciprocal Benefits: A Peek Inside Hawaii's 'Pandora's Box'*, HONOLULU STAR-BULL., June 4, 1997 (via Internet), reporting that Governor Cayetano approved a bill creating "reciprocal benefits" for same-sex couples; the Hawaii Supreme Court had before it in October of 1998 the question whether the state's denial of same-sex marriage violates the Hawaii constitution. In February of 1998 a trial court in Anchorage, Alaska, ruled in a declaratory judgment that the recognition of one's choice of a life partner is a fundamental right. *Brause v. Bureau of Vital Statistics*, Case No. 3AN-95-6562 C1, 1998 WL 88743 (Alaska Super. Feb. 27, 1998). Gay rights groups think Vermont may be the likeliest place to legalize same-sex marriage. Patricia Novotny & Gwynne Skinner, *Same-Sex Marriage: The State of the Law*, WASH. ST. BAR NEWS 14, 16 (Sept. 1998). San Francisco adopted an ordinance in November of 1996 requiring that all companies doing business with The City (as it is called) "must offer the same benefits to domestic partners - lesbian, gay, straight, married, or not - they do to spouses." There were protests from the Catholic Church, which contracts with San Francisco to provide programs for the needy, but the Church "may be shouting in the wind . . . . [T]he trend is growing nationwide." *Businesses Struggle with Domestic Partner Law*, THE BELLINGHAM HERALD, Feb. 6, 1997, at A7.

tion in the vast majority of circumstances is beyond challenge.<sup>13</sup>

Oregon voters in November 1997 overwhelmingly re-approved their support for doctor-assisted suicide (though it lost in Michigan in 1998).

We may think that the revolution's manifestations as gay rights, women's rights, gambling rights, divorce rights, marijuana-smoking rights, birth-control rights, abortion rights, right-to-die, even cloning-human-rights, and so on are laudable. But then must we also accept, say, transvestite rights, bestiality rights,<sup>14</sup> backwards-baseball-caps-at-concert rights, cop-killing-rap-music rights, lurid-tabloid-sensationalism rights, pierced-body-part rights, personal water-craft-roaring-around rights, call-everyone-by-first-name-immediately rights, and ugly, destructive land-development rights?

In the last 100 years, there has been an indisputable retreat of traditional authority such as parents, the church, the school; there has been an apparent surrender in many contexts of our ability to say, "No. This is unacceptable." We have abdicated limits in much of our culture, ethics, and our law. And related, nearly every technological advance, always heralded with bright promise, turns to dross in our hands, becoming a vehicle that reflects our worst sensibilities instead of our best. It was over thirty-five years ago that Newton Minow, then head of the FCC, described television as "a vast wasteland."<sup>15</sup> To most discerning viewers, a great deal of television programming (now hundreds of channels for some people) is still a vast wasteland. Indeed it is fair to observe that Kunstler's suburban wasteland and Minow's video wasteland are cut from the same cloth - one real, the other virtual.<sup>16</sup> It does seem that anything goes, that there are no limits, that nothing is sacred.

Why are there no riots in the streets today demanding action for a decent culture?<sup>17</sup> There are three reasons why the necessity to curtail

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13. Michael Kinsley, *Viewpoint: America Tiptoes to the Left: On Lifestyle Issues Like Marijuana and Gay Rights, Liberalism is Alive and Well*, TIME, Dec. 9, 1996, at 38.

14. As Jack Paar used to say, "I kid you not." Search the Internet for the words "bestiality" and see what comes up.

15. Newton Minow address to the National Association of Broadcasters, N.Y. Times, May 10, 1961, *reprinted in* CONTEMPORARY QUOTATIONS 403 (James B. Simpson ed. 1964).

16. Regarding the Internet: It is probably about as much a "vast wasteland" as television; as with television, there is much good, interesting, and valuable material on the Internet. But also there is much concern about the pornography, racism, and right-wing militant nut-ballism on the Internet. One growing concern is the proliferation of dangerous information on bomb-making and terrorism spread on the Internet. Warren Richey, *Bomb-Building Books Come Under Fire*, CHRISTIAN SCI. MONITOR, May 6, 1997, at 1. Following the suicide in March 1997 of 39 followers of Heaven's Gate there was new concern about the proliferation of cult sites on the Internet. And of course there is much on the Internet that is simply banal.

17. Sometimes there are civil disturbances, even murderous attacks, on abortionists or regarding environmental issues, but these almost never require calling out federal troops to keep the peace. However, Washington State Governor Gary Locke mobilized hundreds of National

modern cultural-economic ruination has not been as apparent as was the necessity to curtail 19th Century cultural-economic ruination, and why the efforts made to date have been mostly feckless. First, serious criticism of our culture was - until the collapse of Communism - un-American and unacceptable.<sup>18</sup> Second, many of the interests injured by modernism's on-going ruination of our civilization are not as immediately economic as those injured in the 19th Century, and the modern victims of ruination (being less economic) have no universally-recognized claim to any protection. Indeed, curtailing modernism's abuses are perceived to cost money, and promoting modern culture (much of it offensive) makes money.<sup>19</sup> Third, the entire thrust and tenor of modernism, necessarily fascinated as it is with novelty (to promote consumption) militates against curtailing its own abuse - we are loath to re-establish any authority the likes of which we threw off only 300 years ago. We think any effective "imposition" of standards of constraint, or so-called decency (civility, really), would be setting the clock back, that the traditions of civility were "abandoned because they became antiquated."<sup>20</sup> We don't know what to do about it.

The 19th Century's "Railroad Problem", and the response to it, may offer us some insights concerning our Modern Problem. It is at base the same problem; it is only partly or even incidentally economic. If we could see why railroad regulation was necessary, and understand more clearly why it was not entirely successful, perhaps we would have some lessons to

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Guardsmen who joined federal, state, and local law officers in late August, 1998 to protect the Makah Indian Tribe's "Makah Days Festival" which included the resumption of whale hunting. Environmental groups had threatened serious disruption of the activities. *Governor Activates National Guard to Protect Makah Fete*, THE BELLINGHAM HERALD, Aug. 22, 1998, at A3.

18. "I now fear that the untrammelled intensification of laissez-faire capitalism and the spread of market values into all areas of life is endangering our open and democratic society. The main enemy . . . is no longer the communist but the capitalist threat." George Soros, *The Capitalist Threat*, ATLANTIC MONTHLY, Feb. 1, 1997, at 45. Brian Arthur, a Stanford economist who argued beginning in 1984 (but could not get his papers published for five years) that the free market system does not work in large parts of the economy, particularly the high-technology and communications industries, observed: "I was saying all this during the Cold War, so ideology got in the way . . . I spent about ten years in the wilderness." John Cassidy, *The Force of an Idea*, NEW YORKER, Jan. 12, 1998, at 32.

This is not to suggest, of course, that there have not been trenchant public critics of our cultural and economic civilization before 1990. There have been many. John Kenneth Galbraith's classic *The Affluent Society* was first published in 1958, and it remains popular. The critics of capitalism (Marx included) have not been wanting, they have only rather recently not been considered traitors or, as Galbraith puts it, heretics. JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* ix (1998).

19. See, e.g., Dirk Smillie, *Tuning in First Global TV Generation: Marketing Bonanza*, CHRISTIAN SCI. MONITOR, June 4, 1997, at 1. Smillie writes that "media moguls" are spreading American culture to young people all around the world because young people want to consume American-type products and they have \$1.9 trillion in spending power to buy them with.

20. WALTER LIPPMANN, *ESSAYS IN THE PUBLIC PHILOSOPHY* 102 (1955). The traditions have become unstylish because advertisers don't like them.



apply to our Modern Problem. Perhaps we could consider what steps to take to develop a decent, respectable culture and a satisfying legal and ethical system.

Necessarily, throughout this essay, generalizations are made; this paper examines tendencies, and trends. Always there are counter-movements and notable exceptions. For the most part, these go unconsidered and this qualifier is not repeated. This is an interdisciplinary essay, drawing on law, but also aspects of economics, sociology, political science, theology, marketing, philosophy, history, and even engineering.

## II. THE 18TH CENTURY FOUNDATIONS OF MODERNISM IN THE WEST

### A. CRUSH THE INFAMOUS THING!

The foundations of modern American - modern Western - culture reach back to the 17th Century and the French Enlightenment. Perhaps the most important part of the Enlightenment, the supreme act of the Revolution against the Ancient Regime, was its anti-religiosity. God was removed as a trans-personal authority, and man became the measure of all things.

The philosophes (the French term for philosopher, used to describe the Enlightenment's propagandists) believed that human reason, addressed to the problems of the human condition, could make a positive difference in mankind's lot.<sup>21</sup> Human society could progress. The cause of human degradation and misery was that the use of reason was corrupted by superstition, prejudice, poverty, ignorance, and above all by the Christian churches. Voltaire wrote "[t]he most absurd of despotisms, the most humiliating to human reason and nature, the most contradictory, the most deadly, is that of priests. Of all priestly dominations, that of the priests of Christianity is beyond question the most criminal. It is an outrage . . . ."<sup>22</sup> And of course one of Voltaire's most famous lines was "er-asez l'infame, - crush the infamous thing".

The theory was that if you provided humans with a social environment, that allowed them free play of right reason, they and society would realize their potential. For the philosophes

[T]he mission of man, which gives meaning to his life, lies in the effort to acquire the widest possible range of autonomous and critical knowledge in order to apply it technologically in nature and, through moral and political action, to society. Furthermore, in acquiring his knowledge, man must not let his thought be influenced by any authority or any prejudice; he must let

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21. See, e.g., Daniel M. Warner, *Time for a New Enlightenment: A Review Essay of the New Ecological Order*, 34 AM. BUS. L.J. 457, 472-77 (1997).

22. LUCIEN GOLDMANN, *THE PHILOSOPHY OF THE ENLIGHTENMENT: THE CHRISTIAN BURGESS AND THE ENLIGHTENMENT* 68 (Henry Maas trans., 1973).

the content of his judgments be determined only by his own critical reason.<sup>23</sup>

#### B. MODERN CAPITALISM AS THE HEIR OF THE ENLIGHTENMENT

As the old authorities of church and state disappeared from human consciousness ("norms and collective values no longer rooted in a theological universe<sup>24</sup>) they also disappeared from the economy. Strictures of place (feudal caste) faded, and men sensed themselves as self-governed, not only in personal thought, but also as to matters of the economy.

It seems self-evident that there is a close relationship between the development of the market economy, in which every individual appears as the autonomous source of his decisions and actions, and the evolution of . . . philosophical visions of the world which treat the individual's consciousness as the absolute origin of his knowledge and action. Likewise, the *disappearance from human consciousness of all trans-individual authority regulating production and distribution* is marked by the fundamental claim of all the writers of the Enlightenment that individual reason must be recognized as the supreme arbiter and subjected to no higher authority . . . All the fundamental categories of Enlightenment thought have a basic stricture analogous to that of the market economy, which constitutes in turn the social basis of the evolving bourgeoisie.<sup>25</sup>

Enlightenment thought and the development of the modern, capitalist, *industrial* state, including railroads, are inseparable. The railroads would not have been built in a pre-Enlightenment culture; originally they were created by men who were significantly the autonomous sources of their own decisions and actions, but as the roads grew they came to deny others their own autonomy.

#### C. THERE ARE NO MODERN TRANS-PERSONAL ETHICS

The economic and cultural consequences of post-Enlightenment civilization have certainly been mixed blessings. The reason is because the fundamental institutions of our society are essentially amoral. Modernism divorces knowledge from value-judgment. The market is morally

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23. at 2.

The core project of the Enlightenment was the displacement of local, customary or traditional morality, and of all forms of transcendental faith, by a critical or rational morality, which was projected as the basis of a universal civilization . . . [T]his morality would be secular and humanist, and it would set universal standards for the assessment of human institutions.

JOHN GRAY, ENLIGHTENMENT'S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE 123 (1995).

24. LUC FERRY, THE NEW ECOLOGICAL ORDER 135 (Carol Volk trans., 1995).

25. GOLDMANN, *supra* note 22, at 20 (emphasis added). This removal of customary, traditional transpersonal authority has been called "the Enlightenment Project." See GRAY, *supra* note 23, *passim*. Moral judgments become mere preferences, and the only unassailable truth is the primacy of capital accumulation.

neutral. So is science; engineers may develop new means of transportation (railroads, the internet) or new weapons without particular thought as to whether the devices are morally beneficial. And culture is also morally neutral. There is no trans-personal standard of morality or ethics that can universally apply to constrain anyone, at least in the traditional sense. Certainly we may all agree that it is wrong to lie, steal, and cheat, because if everyone were free to do so, each of us would spend so much time protecting our property from others' predations that we could do little else. But beyond that, it is difficult to develop a defensible theory of social ethics; to set up any standard is to impose some authority, some limits, exactly what the Enlightenment threw out the window.

Socialist critics were correct to point out that capitalism had for the first time created a fundamentally secular society in which an economy at least indifferent to the distinction between the divine and the demonic, good and evil, beautiful and ugly, gained ground irresistibly.<sup>26</sup> Post-Enlightenment society has embraced the material world as the primary reality, materialism as the dominant value, and economic growth as the primary human purpose. When the philosophes removed God as the trans-personal authority, and declared that man was the measure of all things, they set up a system that encouraged scientific and technological advances (including the development of the railroad) and personal gratification. But the system was, and is, essentially devoid of moral content, however its forms promote liberty, equality, tolerance, and justice. All scientific and economic progress is morally neutral and can contribute almost nothing to the establishment of any moral position or scale of values. In the wake of the French Revolution, we have

experienced a break with religion . . . so essential it can be considered responsible for the creation of the European cultural sphere as a whole. We are talking now about the birth of secularity . . . . [N]orms and collective values are no longer rooted in a theological universe . . . . The "Declaration of [the] Rights [of Man]" symbolizes the advent of norms which no longer draw legitimacy from religious inspiration. Another way of saying it is this: men have discovered that they can and even must resolve the questions of what constitutes a good life or good decision on their own, without taking orders from above.<sup>27</sup>

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26. It has been observed that capitalism does not co-exist with any other social-economic order; it triumphs over them all. "Capitalism in modern business societies has not coexisted with other value systems. It has triumphed over alternative world views, such as those of religion." PAUL F. HODAPP, *ETHICS IN THE BUSINESS WORLD* 3 (1994).

27. FERRY, *supra* note 24, at 135.

The central objection of the Enlightenment project of reconstituting morality as a construction of the human reason . . . is that neither the experimental or empirical method which the thinkers of the Enlightenment revered in the sciences nor any other mode of rational inquiry will yield the morality on whose content they are all agreed.

GRAY, *supra* note 23, at 161.

A further aspect of the Enlightenment rebellion against traditional constraints is the subordination of the non-human world to human will and valuation. Without a God to ordain the order of the material world, or any transpersonal ethical standard that recognizes the earth as having intrinsic value, humans are free to use it for their own ends: "Man enters into insurrection. The world changes into object . . . . The earth itself can show itself only as the object of assault that, in human willing, establishes itself as unconditional objectification. Nature appears everywhere . . . as the object of technology."<sup>28</sup> Philosophically this is the reason for the physical wasteland that Kunstler observes.<sup>29</sup> The unleashing of enormous technical power with no constraining moral direction - splitting the atom, harnessing steam - is bound to result in disaster; it is nihilism.

The point here is not to lament the death of societal religiosity, but to observe that after God was thrown out as the authority, nothing was available to replace the concept.

But if nothing has been invented to replace the ethical authority discarded by the Enlightenment, something was invented to replace the economic authority discarded by the Enlightenment.<sup>30</sup> By the 1880s, when it became apparent that the exercise of post-Enlightenment autonomy by railroad magnates threatened the autonomy of other interests, a social construct very potent, but less ancient than religiosity, was called into question - the idea that business should for the most part be left to oper-

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28. HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* 62-63 (1977), quoted in GRAY, *supra* note 23, at 166.

29. Kunstler, *supra* note 10. Harvey Cox, comparing traditional religion to the new religion of "The Market" (Gray's "free-market fundamentalists"), notes that "[T]here is, however, one contradiction between the religion of The Market and the traditional religions that seems to be insurmountable. All of the traditional religions teach that human beings are finite creatures and that there are limits to any early enterprise . . . . The Market['s] . . . First Commandment is 'There is never enough.'" Harvey Cox, *The Market as God*, *ATLANTIC MONTHLY*, Mar. 1, 1999, at 23. See *infra* text accompanying note 136.

30. The economic constraints existing in pre-Enlightenment Europe were the guilds, [t]he basic economic institutions in the medieval cities . . . . The main functions of the merchant guild were to maintain a monopoly of the local market for its own members and to preserve a stable, non-competitive economic system. To accomplish these ends the guild severely restricted trading by foreign merchants in the city, guaranteed to every member the rights to participate in every purchase of goods made by any other member, required all of its members to charge uniform prices for things they sold, drastically punished cornering of the market, and prohibited many forms of advertising. The function of the craft guild was to groom master craftsmen through a system of apprenticeship. "The industrious and intelligent journeyman could eventually become a master craftsman by accumulating enough money to set up his own shop and by passing an examination . . ." The economic system of the guilds was "not to furnish opportunities for the few to get rich at the expense of the many . . ." but, significantly reflecting religious doctrine, "to provide goods and services for the community and to enable each member of society to live in security and freedom from want." EDWARD M. BURNS, *WESTERN CIVILIZATIONS: THEIR HISTORY AND THEIR CULTURE* 325-26, 329 (1958).

ate by itself, without constraints. The historical and philosophical underpinnings of laissez faire are examined by Henry Carter Adams in his seminal 1887 essay "Relation of the State to Industrial Action" (where he takes special care to lambast the English economist and philosopher Herbert Spencer, who conceived of laissez faire as something of a "scientific doctrine" of evolutionary philosophy - social Darwinism<sup>31</sup>). It is sufficient to observe that as a political/economic philosophy, laissez faire was widely accepted across a broad scope of disciplines, including law. In law it was based on what Morton Horwitz describes as the "old conservative world view that presumed the existence of decentralized political and economic institutions."<sup>32</sup>

Laissez faire was the application to the economy of the Enlightenment concept that each person could determine what was the good life without taking orders from above. Laissez faire permitted the railroads. To understand how the railroad revolution brought about the end of laissez faire in the economic realm, some further understanding of "the Railroad Problem" is in order.

### III. THE RAILROADS UNDER LAISSEZ FAIRE

#### A. THE RAILROAD PROBLEM

Despite the limitations of different gauges (width between the rails) and surprisingly few bridges, the railroads just before the Civil War provided a transportation system far surpassing anything that existed before. The railroads, perceived as reasonably benign by most Americans, up to the middle 50's at least, were seen differently. They became big business, the first big business, and they were resented. Venality is not the only reason why railroads became, or appeared to become, abusive. A number of circumstances and difficulties made them that way.

At base, all of these problems stemmed from the conjunction of Enlightenment economic philosophy and the power of industrialization. The contents of the railroad magnates' judgment, their moral system, came to be determined only by their own critical reasoning, without reference to any external, limiting, transpersonal "truth." Traditional constraints on business practices were significantly loosened. The railroads proposed to effect the emancipation of humanity by appealing to or harnessing economic liberalism, by making a solid front against the tyranny of tradition, including the tyranny of time and distance, at the same time their reason for existence was to make money. Economic success was all

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31. Henry Carter Adams, *Relation of the State to Industrial Action*, in *TWO ESSAYS BY HENRY CARTER ADAMS* 59, 69 (Joseph Dorfman ed., 1969).

32. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 4 (1992).

important; it was built on the aggrandizement of big business over small (accomplished primarily by rates favoring big shippers and discriminating against small ones), destruction of localism, of the small-town (i.e., face-to-face) attributes of personal integrity, upon the promotion of a universalist civilization that simplified big business operations (symbolized by the great effort to standardize railroad gauges and the adoption of standard time zones), and by the subduing of nature (that interfered with business activities).

Problems touched on nearly every aspect of railroad operation – financing and construction, rate setting (that is, operation and competition), employee relations, and industrial safety.

### 1. Problems in Financing and Construction

The need to raise huge amounts of initial capital for construction, and to obtain approval from the political establishment for easements, property, and space upon which to lay rails, and construct the ancillary buildings and railroad yards gave rise to great abuses,<sup>33</sup> summed up by

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33. Wisconsin's experience is illustrative. In that state, Byron Kilbourn orchestrated a successful land grant from the U.S. Congress to finance two railroads. ROBERT S. HUNT, *LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROADS ON WISCONSIN LAW IN THE NINETEENTH CENTURY* 7-8 (1958). The state now had at its disposal vast tracts of federal land that it would give to railroads to finance construction. Kilbourn wanted his company, the La Crosse and Milwaukee line, to get the grants, and he proceeded to bribe the Wisconsin legislature. *Id.* In 1856 he paid each agreeable senator \$10,000 and each agreeable assemblyman \$5,000 in the form of construction bonds. *Id.* at 12. Kilbourn also paid the state "comptroller, the lieutenant-governor, the chief and assistant clerks of the Assembly, and the governor's private secretary five or ten thousand dollars in securities," and he had packages of bonds prepared for judges and for the governor. *Id.* He bribed the press, too. *Id.* at 22.

The blatant bribing of whole legislatures by railroad interests to obtain charters or approval of securities issuances was not of course limited to Wisconsin. It was as late as 1911 that California adopted the initiative and referendum, largely in response to the perception that the Sacramento legislature had been corrupted by lobbyists, especially by the Southern Pacific Railroad.

The Progressives, California's populist party, were primarily responsible for the movement of direct democracy against the Southern Pacific Railroad and other strong interest groups in California . . . . Historians generally agree that the Progressives' platform consisted of "[e]xpanding citizen participation in politics (initiative, referendum, recall, and . . . the direct primary); [t]aming unrestrained corporate influence . . . protecting the environment . . . ; [and] [i]mproving living and working conditions . . . . Advocates believed the initiative process would allow the poor and other minority groups some access to the state legislative process.

Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, n.18 (1994).

Throughout the United States the entire era from 1855 to 1895 was highly colored by what we today would consider unacceptable scandal. Railroad promoters organized railroad "construction companies" that sold securities to finance construction and paid dividends from the railroads' profits. Politicians such as James G. Blaine, James A. Garfield and others bought into such securities; the amount of "water" in such stock apparently somehow correlated to the purchaser's political influence. JOHN F. STOVER, *THE LIFE AND DECLINE OF THE AMERICAN RAILROAD* 79-80 (1970). In the North, railroads were built, however corrupt the financing; in the

one writer as follows:

The power of railway corporations was growing and was being used to influence public officials; the system of construction was wasteful and corrupt; the stocks and bonds were badly watered; and in some instances the rates were undoubtedly higher than necessary for a fair return on the physical value of the road.<sup>34</sup>

These abuses stemmed from a high interest in capitalization and a low interest in any countervailing constraints (traditional conceptions of “decent” business practices). Heaven knows, anything goes.

## 2. *Problems in Rate Setting*

For nearly 100 years, from 1830 to 1930, no single economic issue so consistently dominated American civilization as “the Railroad Problem,”<sup>35</sup> and in the ‘80s and ‘90s, when the railroads reached their apogee of power and importance, the most apparent and disturbing problem was rate setting, an issue of great complexity that roiled every element of society and every point of the manufacturing and distribution chain. The primary mechanism of rate manipulation were rebates - discrimination in rates charged, a practice that had a profound effect upon the development of our modern economic system by aggrandizing the biggest shippers.<sup>36</sup> In a nutshell, the problem was that railroads did not, and really

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South, progress was much slower and corruption more debilitating. *Id.* at 81. All throughout the railroads’ areas of expansion, farmers and shopkeepers were encouraged to invest in the railroads’ securities, mortgaging their farms to secure the indebtedness, always with the promise that the ever-increasing prosperity wrought by the railroads would easily offset any debt owed. SOLON JUSTUS BUCK, *THE GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC AND SOCIAL MANIFESTATIONS* 10 (1913). Most of the farmers lost their investments. *Id.*

In the Northeast, Commodore Cornelius Vanderbilt, who had accumulated a fortune of some \$11 million by 1865 from his steamboat operations, convinced the New York legislature that the combination of the New York Central and Hudson River Railroad was good public policy. To the assertion that such a combination might violate the common law against monopoly, Vanderbilt - one of the 19th Century robber barons - is said to have snorted, “Law! What do I care about law? Hain’t I got the power?” JOHN F. STOVER, *THE LIFE AND DECLINE OF THE AMERICAN RAILROAD* 83 (1970). When he died in 1877 his fortune was \$105 million.

34. BUCK, *supra* note 33, at 15. Buck does not assert that all discriminations were unjust. The railroads operated in an arena of the most vicious competition and were frequently driven to rate-cutting for survival. Buck’s complains that the railroads bribed public officials; Albro Martin, interestingly revisionist, says: “About bribes, from petty requests for free passes on the railroads’ passenger trains to real money, railroad men often remarked that the hand was usually outstretched to demand them before the offer was made. Such remarks fairly infuriated critics . . . .” MARTIN, *supra* note 3, at 330.

35. The Problem was not always the same: in the early days it was insufficient capital, technological primitiveness, obstructive competition from canals and stage coaches. *See, e.g.*, JOHN F. STOVER, *AMERICAN RAILROADS* 17 (1961). Later, in the 1850s, it was insufficient mileage, confused gauges and corruption.

36. The rate issue at base involved three types of discrimination: between classes of traffic

or freight, between places, and between persons. Corrupt financing directly affected financiers, including the small farmer and shopkeeper; corrupt pricing (part of operations) affected customers, that is, everyone, and pricing - rate setting - was the apparent heart of the Railroad Problem. During the period of railroad expansion following the Civil War, it became clear that competition was not going to check railroad pricing problems. Price fixing was rampant (and not illegal). There was considerable justification for the practice, actually: railroads required such huge capital investment that competition often meant rate wars that threatened investors with bankruptcy. If the railroads survived those wars, it was often because they charged shockingly high rates where there was no competition. Gross discrimination in pricing was common and galling.

In freight service, discrimination most often took the form of secret rates and rebates and was almost always in favor of the large and powerful shipper. Obviously railroads involved an enormous fixed cost in all the track, equipment, depots and stations. The total cost of operating the railroad did not increase proportionally with an increase of traffic. Therefore, a large volume of traffic was thought desirable so that overhead expenses could be spread over a large number of units. This seemed to justify low (and often discriminatory) inducement rates. Also, costs did not increase in proportion with the distance traveled because switching and terminal costs were the same for a long or a short run. Therefore, it seemed reasonable that long-haul traffic should be charged less per mile than short-haul traffic. Additionally, there was always unused capacity. At harvest time rolling stock was in great demand, but the cars sat idle most of the year and would have to be hauled back to the granaries empty. Therefore, business solicited for the return trip was not expected to pay the full cost. Moreover, despite popular perception to the contrary, most of the railroads in populated areas, at least, had vigorous competition. This was not only from other railroads, but from canals, turnpikes, and river traffic. A small difference in price could cause a shipper to move from one type of transport to another. Again the response was price discrimination and the cutting of individual deals for each shipper.

Railroad rate-setting was not a science; modern cost accounting was in its infancy and rate setting was not based primarily on economics. Railroad rates were set based on what the market would bear. The need to adjust rates so as to meet the requirements of the local situation was universally acknowledged by railroad managers, and for this reason freight agents were generally authorized to alter rates at will. The printed tariff was merely a guide. MARTIN, *supra* note 3, at 200.

Shippers often extorted favorable rates from the roads, on the threat of taking their business elsewhere. Martin, *supra* note 2, at 44; STOVER, *supra* note 33, at 87. William H. Vanderbilt, son of the Commodore, continued after his father's death to operate the New York Central with prudence and acumen, but not even the Vanderbilts had the power to stop rate wars. The wars raged regularly and often, like "small pox or the change of seasons," driving some railroads into periodic bankruptcy (from which refuge, like airlines 100 years later, they were sometimes able to operate with savings from not paying bond interest or dividends). *Id.* at 85. If passengers and shippers benefited from cheap rates, for example, cattle from Buffalo to New York once went for \$1.00 a head, and passengers from New York to Chicago paid \$5.00, they were baffled by the frequent rate changes and fluctuations. *Id.* at 86.

In passenger service, price discrimination was mainly in the form of the free passes, "by which all public officials from the highest judges to the local selectmen received free transportation for themselves and their families over the lines of interested railroads." BUCK, *supra* note 33, at 13. The railroad evil of mixed blackmail and bribery was finally outlawed by the Hepburn Act in 1906. This subtle bribery was particularly galling to those who paid full fare, and was a source of great resentment. STOVER, *supra* note 35, at 123. In short, "[t]here were gross and often totally unjustifiable discriminations which injured both shippers and consumers and indirectly added to another cause of complaint by fostering monopolies." BUCK, *supra* note 33, at 15.

Railroads had obtained the power to produce either a concentrated economy, with progressively larger business units, or to perpetuate the small-scale economy of antebellum America. "The proliferation of rebates hastened the shift toward an integrated national economy, top-



could not, set their rates in a way that was consistently fair to their customers. Perhaps it is more correct to say that the railroads could set reasonably fair rates, but the problem was their inability to collect them. During good times the railroads laid track space, and during bad times, disregarding their own schedules, they cut their rates in ruinous competition (and then flopped into bankruptcy regularly). One of the railroads' responses to this very difficult problem of competition was to concentrate the business (reduce competition by reducing the number of competitors), to form "pools" or trusts to organize competitors (and thus rate-setters) into some kind of controllable group or into one company. Early efforts were not particularly objectionable, but success encouraged ever grander schemes of monopolistic control.<sup>37</sup>

### 3. *Problems in Employee Relations*

If the investors and customers had cause to complain about abuses, so did the employees. Railroad employees were the first to work in large numbers for big impersonal corporations that grew up after the Civil War, and many of these employees - engineers, conductors, brakemen, switchmen - were highly trained workers upon whose competence and professionalism millions of dollars in equipment and thousands of lives depended. These employees formed the first successful modern labor unions, edifices constructed out of desperation to provide an effective counter-force to the edifice of the first modern big business.<sup>38</sup> Big business was - and is - informed with the post-Enlightenment assumption, or pretension, that the free-market science of management (like science in general) contained a rationally privileged world-view that was not particularly inherently supportive of human needs, needs such as belonging and

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heavy with giant companies enjoying preferential freight rates." RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 115 (1998).

37. In 1901 Edward H. Harriman (the major stakeholder in the Illinois Central and of the Union Pacific) jostled with James J. Hill (owner of the Great Northern and the Northern Pacific) over control of the Southern Pacific (with its access to California) and the Chicago, Burlington & Quincy (with lines into Chicago). The contest was resolved when the principals met and "wrapped up the Burlington and Hill's two lines . . . in a monster trust to be called the Northern Securities Company." MARTIN, *supra* note 2, at 101. It is in this libidinous urge toward monopolies and bigness that the colors of Enlightenment-industrialism are most clearly shown: always the thrust is to eschew the local, particular, the customary; always "to disrupt traditional conceptions of the human relationship with the earth, and to supplant them by humanist and Baconian instrumentalist understandings, in which nature is nor more than an object of human purposes." Gray, *supra* note 23, at 146.

38. Organized originally as mutual-insurance societies, the Big Four Brotherhoods (Engineers, 1863; Conductors, 1868; Firemen, 1873; and Trainmen, 1883) became collective-bargaining entities by the mid-seventies, when the railroads moved from their period of growth to competition. The unions represented workers who could not easily be replaced, and that, practically, but not legally, forced management to recognize and bargain with them. Alfred D. Chandler Jr., *The Railroads: The Nation's First Big Business* 129 (1965).

membership, security and continuity, that in the past were met by social institutions sheltered from the market. Given management's view that labor was a commodity to exploit as fully as possible, problems were inevitable.<sup>39</sup>

#### 4. *Problems in Safety*

Unconstrained, the railroads' record of good-faith dealings in financing, rate-setting, and labor relations was not good. Their record of good-faith efforts to make train travel safe was not good either.<sup>40</sup> It is no criticism of railroad management that the business itself was dangerous and new. Complain more that many railroad managers apparently took for granted the fact that railroad workers risked life and limb, and that the knowledgeable railroad safety reformer Lorenzo S. Coffin, a former school teacher and Civil War chaplain (who witnessed a brakeman lose the remaining two fingers on his right hand in the familiar link-and-coupler accident), was regularly rebuffed when he wanted to discuss railroad safety; managers "refused to see him, or were 'in conference,' or had

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39. The attitude of the post-Civil War industrialist toward labor differed little from that of the industrialist of pre-War days. He opposed unions and supported long hours and low pay. Only a small minority recognized that hours, wages, and productivity were interrelated. Labor was regarded by most businessmen and by most of the public as a commodity, and in the interest of economizing on resources, it behooved the businessman to buy it at as low a price as possible and in as small amounts as possible.

HERMAN E. KROOS & CHARLES GILBERT, *AMERICAN BUSINESS HISTORY* 169 (1972).

Here too, vigorous competition exacerbated the problem. Even if management of one road were inclined to provide its employees with good pay, safe working conditions, and such things as vacations and compensation for on-the-job injuries, a single competing railroad management could make such decency economically infeasible. The good-hearted company would be at a competitive disadvantage, and there was no one and no way to say that the "bad-hearted" company was wrong, for the standard of success was capital accumulation.

Time is money. When it became apparent that railroads could, as the popular phrase had it, "annihilate time and space," time became very important. People had to be ready to board the train on time; the trains had to run on time, especially before the telegraph made it possible to communicate with trains on the same track; and those who labored in the mills and factories also had to work on time. Factory time was created with railroad time. Employees became "disciplined to react to bells and whistles. Railroads not only standardized and speeded up time, they 'annihilated' hours that traditionally had been dedicated to leisure." JAMES A. WARD, *RAILROADS AND THE CHARACTER OF AMERICA: 1820-1887* 115 (1986).

40. Three major improvements in safety were needed. One was in the signaling and control of trains: it was essential that only one train be on a track at a time (a train might be switched onto a track that, 50 miles ahead, was being used by another). The second was in braking: it was no longer feasible to have brakemen take their place on car tops at a signal from the conductor, to turn wheels on top of the cars to apply brakes; the trains had become too fast and too heavy, and - as cars got bigger - the headroom above bridges and overpasses narrowed to dangerous limits (of course too, twisting hand brakes on top of moving cars in an icy blizzard at night was dangerous at best). The third necessary improvement was in coupling: the old link and pin set up cost many a brakeman fingers or a hand, because he had to stand in between two cars to line up the holes and drop the pin inside.

'gone to Europe.'"<sup>41</sup> Managers would not adopt available safety devices because "they were expensive, while labor was cheap,"<sup>42</sup> because no one could make them do it, and because any line that spent money on safety was at a competitive disadvantage with those that did not. Humans were commodities.

Some aspects of the more traditionally examined Railroad Problem are outlined here. Underlying the superficially economic problems of the railroad, however, were the overwhelming *cultural problems*, as discussed more fully in the sections below. The railroads changed everything; they destroyed the old ways. The response to the economic Problem was government regulation, the end of *laissez faire*, the reimposition, in a way, of the God that had been thrown out the window in the Enlightenment. This story is told in a vast body of literature on the regulation of railroads<sup>43</sup> and on the legal history of business regulation. A brief review of its death in the railroad industry is considered here. There was, and has not been, any significant regulation of the railroads' cultural spawn.

## B. THE END OF ECONOMIC LAISSEZ FAIRE

### 1. *The Failure of Railroad Laissez Faire in General*

The first significant labor strike of the new industrial age occurred in the summer of 1877. First the police were overwhelmed, then the militia, and finally the regular army was called, and it had to be backed up by 10,000 civil war veterans. The rebellion was crushed by a huge military force.<sup>44</sup> In the 1880s there were increasingly volatile swings in the eco-

41. STOVER, *supra* note 33, at 72.

42. *Id.*

43. The literature is vast. For an annotated bibliography see MARTIN, *supra* note 3, at 339-416.

44. Railroad workers protested eastern railroad pay cuts (while the newspapers ran feature stories on the lives of shocking opulence led by the Hills, Vanderbilts, and their ilk). In the half-dozen years from 1871 railroads had "systematically cut wages until by 1877, on some roads, workers had undergone a 35 percent cut in wages." RONALD L. FILIPPELLI, *LABOR IN THE USA: A HISTORY* 72 (1984). In addition, management had taken the opportunity to crush the young unions. *Id.* Workers in Martinsburg, West Virginia, struck, refusing to allow freight trains to move. Local militia, called out at the governor's request, sided with the workers. The strike spread all across the county. In Pittsburgh howling mobs besieged the state militia in a round-house and destroyed more than \$5 million worth of property; violent unrest spread to Buffalo, Chicago, St. Louis, Omaha and St. Paul. First the police were overwhelmed. Then the militia, and finally the regular army were called out, and it had to be backed up by GAR veterans, "10,000 of them being required to reopen the main line of the Pennsylvania." STOVER, *supra* note 33, at 119. And the strike was not only of railroad workers: miners supported the strike in Martinsburg and Pittsburgh and Scranton; millhands and the unemployed, black sewer men in Louisville and stedevores in Cairo held sympathetic strikes. Twenty-thousand workmen demonstrated in Chicago. RONALD L. FILIPPELLI, *LABOR IN THE USA: A HISTORY* 73 (1984). The strikes and demonstrations ended, of course; the worst of the recession was over by late fall of 1877, and activists turned their attention to political organization. *Id.*

conomic cycle and there was increasing violence in labor relations: property destruction and mob violence were not uncommon. By no means could authorities trust the police, militia, or even the army to obey strike-breaking orders. Major crises of civil disturbance threatened.<sup>45</sup>

The widening sense of crisis in the 1880s gave profound thought and encouragement to those who questioned whether government in fact had no role in controlling business, and to those who questioned whether the "law" of supply and demand was really written in the stars. More and more "Classical Legal Thought was . . . criticized for its insistence on an anachronistic vision of social relations, a vision that expressed outmoded individualistic ideals that had been nurtured by decentralized institutions."<sup>46</sup> Amid this growing crisis of social, ethical, legal, and economic culture, it became clearer that *laissez faire* was outmoded. A revolutionary machine<sup>47</sup> required a revolution in society. In 1896 Henry Carter Ad-

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45. In 1886 tensions caused by labor disputes (low wages, long hours, perceived judicial and legislative lack of sympathy for working-class issues) were brought to the boiling point when Chicago police attacked demonstrators at the Haymarket Square labor rally and eight labor leaders were framed as riot leaders. An interlude of prosperity was followed by another economic downturn in 1893. Eugene Debs' American Railway Union, formed in that year, authorized a boycott of the Chicago-based Pullman Palace Car Company in June of 1894 (the company had laid off a large number of men and reduced the wages of those remaining). Debs' fledgling organization was no match for the railroad managers, who were ready and, indeed, eager, to wage industrial war. The General Managers Association "recruited strikebreakers, brought legal action against the strikers and their unions, and kept in close communication with civil and military authorities as to the movement of police, marshals, and troops." CHANDLER, *supra* note 38, at 131. Violence broke out early in the strike; on July 2 (at the request of the U.S. government - not the railroads) a district judge issued a sweeping injunction order; when Debs and his followers disregarded it, they were arrested and jailed. *Id.* The injunction, issued under the Sherman Antitrust Act, was upheld by the Supreme Court, not on the grounds that the strike violated the Sherman Act, but rather under the Commerce Clause; Justice Brewer wrote: "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails." In *Re Debs*, 158 U.S. 564, 582 (1895). It was because the working people had "no property, privilege, or advantage that they can place in jeopardy as a pledge for the fulfillment of a labor contract" that the U.S. labor movement was so violent. ADAMS, *supra* note 31, at 152. That is, workers had nothing to lose.

William Deverell devotes a long chapter to the Pullman Strike of 1894 in California. WILLIAM DEVERELL, *RAILROAD CROSSING: CALIFORNIANS AND THE RAILROAD: 1850-1910* 70-71, 80-81 (1994). As in other states, workers, railroad and others, did not refuse to allow trains to run, but only refused to allow trains with Pullman cars to run. *Id.* The strike started as a Pullman boycott. *Id.* When it escalated in violence because of a few strikers' actions in Oakland, the National Guard was called out to preserve peace and protect property, but the Guardsmen, disobeying orders, refused to fire on their family and friends. *Id.* In Los Angeles, federal troops were mustered, but it was clear that their sympathies were largely with the strikers. *Id.*

46. HORWITZ, *supra* note 32, at 66.

47. That the machine was revolutionary was apparent to contemporary observers. Writing in 1906, Professor of Economics Lewis Henry Haney, described the railroad revolution:

We know that with the introduction of the railway there came a new factor into the life of the nation and of the world, which radically affected all phases of that life. The railway is both quantitatively and qualitatively different from other and earlier means

ams, in a speech before the American Economics Association (of which he was then president), said:

[E]very change in the social structure, every modification of the principle of political or industrial association, as well as the acceptance of a new social ideal, must be accompanied by a corresponding change in those rights and duties acknowledged and enforced by law. Should this development in jurisprudence be arrested or proceed sluggishly, as compared with that of some particular phase of associated action, serious mischief will inevitably follow. This is true because such unequal development would evidence the general appreciation by men that the law fails to express rights which they hold to be fundamental. . . . In all this there is nothing new. . . . The only strange thing in the situation is that, while this is easily seen with regard to controversies of the past, it is with difficulty appreciated when a controversy that touches our lives is the subject of the analysis.<sup>48</sup>

A corresponding change in rights and duties - standards of acceptable behavior in society - acknowledged and enforced by law was forthcoming. Until about 1870 the aim of most railroad legislation in the United States "had been to secure rapid increase of railroad facilities."<sup>49</sup> But after 1870 a reaction set in. State regulation of the railroads had begun in Rhode Island in 1839, but the states<sup>50</sup> were unable to deal effectively with the railroad problem because railroads were interstate commerce. In many ways, the task was a new one - it fell upon the federal government.<sup>51</sup> Before the Civil War the responsibilities of both state and

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of conveyance and communication. But was this apparent to the men . . . of the early 19th Century? On the whole, it may be said that it was.

HANEY, *supra* note 2, at 75.

On his 91st birthday and 50 years after the fateful gathering in 1776, Charles Carroll, the last surviving signer of the Declaration of Independence was asked by the citizens of Baltimore to participate in a ground-breaking for the Baltimore and Ohio Railroad on July 4, 1828. As he turned the ceremonial spade he said: "I consider what I have just done now to be among the most important acts of my life, second only to my signing the Declaration of Independence, if indeed it be second to even that." MARTIN, *supra* note 3, at 5. And Samuel Bowles, an English traveler writing in 1870, said of the transcontinental railroad experience: "It is the unrolling of a new map . . . a revelation of a new empire, the creation of a new civilization." *Id.* at 55.

48. HENRY CARTER ADAMS, *Economics and Jurisprudence*, in *TWO ESSAYS BY HENRY CARTER ADAMS* 138, 139 (Joseph Dorfman, ed., 1969).

49. ARTHUR T. HADLEY, *RAILROAD TRANSPORTATION, ITS HISTORY AND ITS LAWS* 22 (1903, reprinted 1968). This appears to be the aim in general, still, of government-subsidized port and airport authorities, trade booster associations, chambers of commerce, departments of commerce, and the like.

50. For a discussion of state regulation in Illinois, Minnesota, Iowa and Wisconsin respectively see, e.g., BUCK, *supra* note 33, at 123-58, 159-66, 166-79, 179-94.

51. See STOVER, *supra* note 35, at 104-143; STOVER, *supra* note 33, Chapters 3 and 4: *Years of Integration, Corruption, and Service, A New Century, Years of Maturity*; BUCK, *supra* note 33, Chapters IV, V, and VI: *Granger Railway Legislation*; LEWIS H. HANEY, *A CONGRESSIONAL HISTORY OF THE RAILWAYS IN THE UNITED STATES, 1850-1887*, Book III: *Regulation* ("This is a history of action and reaction between railways or railway companies and the government.") 7 (1906).

federal governments were, for the most part, to confer benefits; “the hand of the government doled out benefits to individuals; it did not restrain or discipline them by regulatory inhibitions.”<sup>52</sup>

## 2. *The Railroad Problem Addressed*

By 1886 most businessmen - including railroad executives - were ready for regulatory inhibitions, especially to address the classic Railroad Problem - rates.<sup>53</sup> President Cleveland signed the Interstate Commerce Act on February 4, 1887.<sup>54</sup> It was the first piece of general government regulation of business in the United States.

The ICCA, in its first 15 years, was not very effective. Gabriel Kolko sums it up when he observes that “the basically competitive and semi-chaotic structure of the railroad industry was not significantly altered during the 1890’s by the consolidation movement, rate associations or the

52. KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY* 353 (1996).

53. Clearly necessary because of the continued civil unrest generated from the perception, at least, that railroad rate-setting as it had been practiced was socially unacceptable. The roads themselves favored regulation. GABRIEL KOLKO, *RAILROADS AND REGULATION 1877-1916* 232 (1965): “[T]he railroads . . . supported the basic principle and institution of federal regulation . . . [a]nd . . . enthusiastically worked for its extension . . .” *Id.* This was because the railroads’ own inter-road efforts to control competition were politically and practically infeasible.

54. The Interstate Commerce Act, in language perhaps deliberately vague, required that all interstate rates be “reasonable and just” and prohibited the familiar competitive practices of rebates, drawbacks, and pools [rebates were refunds of money paid by the railroads to certain shippers to lower those shippers’ rates; drawbacks were “refunds” paid to certain shippers from the higher rates the railroads charged those shippers’ competitors; pools were arranged to assign carriage to competitors and to fix the rates charged among them]. It required the railroads to publish their rate schedules, a practice rarely observed, though normally required in most of their charters, and directed the roads not only to post their schedules “in every depot or station” but also to file them with the government. Higher charges for non-competitive short hauls than for competitive long hauls were also prohibited. A five-man Interstate Commerce Commission was created to administer the Act and enforce its prohibitions. The Commission could hear complaints from shippers, examine witnesses, and look into the records and books of railroad companies. It could also demand annual reports from the railroads . . . . While the Commission could not fix railroad rates, it could issue a cease-and-desist order for the carrier to reduce its charges. If the railroad refused to comply, the Commission could only enforce obedience through the federal courts.

STOVER, *supra* note 35, at 131-32.

Here is part of the ICC’s description of the power granted to it by Congress:

All charges made for services by carriers subject to the act must be reasonable and just. Every unjust and unreasonable charge is prohibited and declared to be illegal. The direct or indirect charging, demanding, collecting or receiving, for any service rendered, a greater or less compensation from any . . . person than from any other for a like . . . service is declared to be unjust discrimination and is prohibited. The giving of any undue preference, as between persons or localities or kinds of traffic . . . is declared to be unlawful . . . . Contracts, agreements, or combinations for the pooling of freights of competing railroads . . . are unlawful. All carriers . . . are required to print their tariffs . . . . Copies of all tariffs are required to be filed with this Commission . . . .

INTERSTATE COMMERCE COMMISSION, *FIRST ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION* 10-11 (1887).

ICC. Rates continued to decline.”<sup>55</sup> However feckless were the earliest efforts at government regulation, by 1889 the country had “passed beyond the stage at which the right of legal control [of railroads] was questioned.”<sup>56</sup>

Besides dealing with the general problem of rate setting, the government engaged in other arenas of the railroad business: safety, labor relations, and antitrust regulation.<sup>57</sup> By 1926, it was possible to say that

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55. KOLKO, *supra* note 53, at 66. It is conventionally assumed that the Supreme Court, when it had the opportunity to decide, ruled in favor of the railroads, against the ICC and the public interest. Kolko disputes this; sometimes the Court declined to interpret the ICCA so as to make it effective, and at the same time it struck down industry efforts at desperately needed self regulation. Kolko asserts that “[t]he Supreme Court left the railroad industry in a state of anarchy, without legal or voluntary relief.” *Id.* at 83.

56. ADAMS, *supra* note 31, at 62. Significant and effective railroad regulation dealing with the problem of railroad rates had to wait for Theodore Roosevelt. In June, 1906 the Hepburn Act was overwhelmingly approved in Congress, giving the ICC the power to actually set rates. KOLKO, *supra* note 53, at 113-14. The Commission’s rate-setting authority did not, certainly, end “the railroad problem. The “problem” included terrible shortages of rail cars during the period 1914-1919, as allowable rates that had fallen far behind the increases in the cost of living (the cost of living went up - or the value of the dollar down - by 30% between 1900-1915, but rail rates “stayed practically motionless).” STOVER, *supra* note 33, 117-18. Still

by the eve of World War I the railroads of America had become increasingly regulated by a comprehensive system of governmental controls. Generation-long mismanagement, discrimination, and corruption from the days of Gould, Drew, and Vanderbilt had eventually resulted in Granger state regulation which had now been made much more stringent on a national level . . .

*Id.* at 116.

In a somewhat different interpretation Kolko observes that the roads themselves had attempted without success to give effect to essentially feckless legislation; they were thwarted in their efforts at self regulation (through pooling and consolidation) by the Supreme Court and by uncooperative road owners, and so “[n]ew legislation was the only means left open to the railroads.” KOLKO, *supra* note 53, at 83.

57. *Railroad safety.* In railroad safety, George Coffin, inexhaustible, finally prevailed. Major Eli H. Janney’s automatic car coupler, George Westinghouse’s air brake, and sophisticated electro-mechanical switching systems were adopted as standards in the industry and then mandated by the Railroad Safety Appliance Act, approved by Benjamin Harrison in 1893. “The improvement in railroad safety was dramatic. The railroad-employee accident rate, which had gone as high as 30,000 in 1881, was quickly cut 60 percent.” STOVER, *supra* note 35, at 154. Albro Martin points out that the railroads themselves voluntarily adopted the new safety equipment system-wide ten years before the federal mandate required it. MARTIN, *supra* note 3, at 308.

*Labor relations.* In labor relations, the summer 1894 was long and difficult. The Pullman riots were that June. But the year marked a turning point in government regulation of the labor-management relationship. President Cleveland had appointed a commission to investigate the Pullman riots. The commission recommended the appointment of a board of professionals to mediate future industrial conflict; the Erdman Act, in 1898, did that. CHANDLER, *supra* note 38, at 132. The Erdman Act, 30 Stat. 424 (1898), was the second attempt to deal with railroad labor unrest. The first effort, the Railway Labor Arbitration Act, 25 Stat. 501 (1888), provided for voluntary mediation of disputes and official investigations labor problems, but it had no enforcement provisions; its arbitration power was never used, and its investigation power was used only once, following the Pullman strike. E. EDWARD HERMAN & GORDON S. SKINNER, *LABOR LAW:*

American railroads were, in every aspect of their economic operation, subject to such pervasive government regulation that they were no longer free competitors.

### 3. *The Effect of Railroad Regulation*

It is beyond the scope of this paper to analyze in any detail whether railroad regulation was an economic success. It is apparent, however,

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CASES, TEXT, AND LEGISLATION 64 (1972). The Act also provided for enforcement of voluntary arbitration decisions and it outlawed the yellow-dog contract (an employee agreed, as a term of his employment, never to join a union, and if he did, he could be fired). *Id.* at 64. Other labor legislation followed, including the Newlands Act, 38 Stat. 103 (1913), which established a full-time Commissioner of Mediation, and the Adamson Act, 39 Stat. 721 (1916), which implemented an eight-hour day.

The Army Appropriation Act of 1916 gave the federal government authority to take over the nation's entire railroad business. The railroads were well organized when it came to making a solid face against the internal problem of unionization, but far too disorganized to deal with the huge increase in freight volume accompanying the increasing industrial output necessary to arm the Allies in Europe in 1917; on December 26, 1917, using the Act of 1916, President Wilson announced that the federal government would take control of the railroads. The government ran the nation's entire railroad system under Director-General of Railroads William G. McA-doo; it retained control of the vast industrial enterprise until 1920. For a discussion of the take-over and its consequences see STOVER, *supra* note 33, at 158-77. Railroad owners were not entirely unhappy with government control, the government certainly had a deep pocket for capital acquisition and maintenance, but the experience was bad enough so that after Pearl Harbor "a rather substantial co-operation within the rail industry was formed . . . . American railroads managed to meet the tremendous transport requirements of World War II without having to endure any substantial measure of governmental direction." *Id.* at 159.

*Antitrust regulations.* The railroads' freedom to contract with each other in restraint of trade was constrained, too. See *supra* note 37 and accompanying text. The huge trust proposed by Edward Harriman and James J. Hill, the Northern Securities Company

exceeded the limits to which the community-of-interests technique could be pushed in the trust-conscious America of the 1900s. The decision of the Supreme Court in recent years had greatly weakened the application of both federal and state laws in controlling large corporations, to be sure. And the simultaneous arrival of prosperity and William McKinley in 1897 seemed to guarantee a maximum of freedom for the proponents of cooperation. An assassin's bullet, however, was to change these conditions drastically so that by the end of the decade trustification, for better or worse, would no longer be an available means for reconciling divergent points of view among industrial leaders . . . . In three short years the government's demand for dissolution [of the Northern Securities Company] reached the Supreme Court, which, by a surprise five-to-four decision, ordered the combine dismantled. This was by far the most significant application of the restraint-of-trade concept in preventing the centripetal forces of high finance from placing the entire American transportation system under an oligarchy of three or four powerful men.

MARTIN, *supra* note 2, at 101-02.

Upon return of the railroads to private control in 1920 it was apparent that new, effective labor legislation would be needed, and this was forthcoming, finally, in the Railway Labor Act, 44 Stat. 577 (1926). This act for the first time in American legal history forced management to recognize and bargain with unions; it also created an elaborate mediation process and, in the event mediation failed, it authorized Presidential intervention. Various amendments, the act of 1926 is still in effect, governing not only railroads but also airlines. It was the first modern labor legislation.



that railroads today are a mere shadow of their former glories. We may take it from thoughtful, well-spoken scholars like Albro Martin (there are also other commentators who are less graceful about it) that the railroads were ruined by

the so-called Progressive movement, so idealistic in theory and so devastatingly self-serving of politicians and special interests alike in practice. It was the factor that destroyed the wholesome environment in which America's railroads were facing the perils of [late 19th Century] prosperity. It was on the railroads that these philosophies of government intervention in business were carried farthest in the direction of ultimate disaster.<sup>58</sup>

Why was railroad regulation not a success? If railroad men were not ogres, if they were not really Robber Barons, do we need to look instead at Theodore Roosevelt, William Borah and "Fighting Bob" LaFollette, to name only three Progressive Era politicians, and say that they were the ogres in the piece? Martin gets testy toward the end of his book; he refers to the American peoples' "deathwish against the indispensable railroad," and says that "the enthusiastic cooperation of politicians were consistently eager to pander to cheap public opinion and short-term expediency."<sup>59</sup> Martin says that the Granger Laws, (all the railroad regulatory statutes from 1886-1920) were stupid, "almost as silly an act of public policy as the (1830's) Windom Committee's recommendation to dig canals furiously across the Appalachians."<sup>60</sup> For the most part, with good humor, Martin denounces historians, journalists, and college professors who have misunderstood or misrepresented the Railroad Problem.<sup>61</sup> He also describes the seminal Interstate Commerce Act, which was adopted just as the railroads were figuring out what to do with their own problem (consolidate, consolidate), as the "doors of political demagoguery slamming in their face."<sup>62</sup> The ICC is described as so short-sighted and ignorant that it consistently turned down "almost every railroad innovation that came before them"<sup>63</sup>; and those whose way of life was altered and destroyed by the railroads are depicted as sputtering complaints in "loud, indignant squawks."<sup>64</sup>

Whether the laws were successful or not depends upon what they were intended to do. If they were intended to invigorate the roads, attract the best minds to the business and encourage them to innovative competition and capitalization, apparently the laws were not a success, as

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58. MARTIN, *supra* note 3, at 349.

59. *Id.* at 385.

60. *Id.* at 329.

61. *Id.* at 150, 175, 180, 382, 385.

62. *Id.* at 214.

63. *Id.* at 302.

64. *Id.* at 231.

the revisionists convincingly argue; it was pretty much down hill for the railroads from about 1890 on. If, on the other hand, railroad regulation was really intended to return to the people some of what the railroad – modernism – seemed to have taken from them, then the effort to regulate, at least, may be viewed more favorably. In short, the Granger Laws significantly addressed the wrong Railroad Problem. If they had any success in dealing with the real problem, the success was incidental. The significant problems were not economic, but rather ethical and cultural. The problem was the destruction of localism, of the importance of the character of place and person and the substitution of uniformity, of urbanity and urbanization and of personality.

Almost coincident with legislation that finally gave the government effective and ultimate control over the railroads by removing from them any broad-based freedom to contract<sup>65</sup> came the beginning of the end of railroad dominance. By 1914 the Ford Motor Company was selling half a million automobiles a year; by 1930 there were 23 million passenger automobiles in the United States.<sup>66</sup> In the “teens” the states and the federal government began enormous road-building programs, hugely subsidizing the growing automobile, truck, and bus industries and making possible a vast movement of people and freight on paved roads and highways.<sup>67</sup> Only a few far-sighted people predicted in 1904, the year of Kitty Hawk, that air travel was feasible<sup>68</sup>; 25 years later, in 1930, over 73 million passenger-miles were flown; in 1965 it was 58 billion air miles,<sup>69</sup> and in 1992, 367 billion domestic air-passenger miles.<sup>70</sup> The railroad era is over, but before the railroads departed from American imagination as the primary instrumentality of modernism (they are still of real and romantic importance) they worked a transformation in law, as here suggested, and of ethics and culture. We turn to this latter transformation that was not addressed by railroad regulation.

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65. The railroads, as here discussed, lost the freedom to contract for fares, rates, routes, with each other, or with their employees.

66. STOVER, *supra* note 33, at 137. In 1992, Domestic automobile use accounted for 80.5 percent of all passenger miles, and railroads .7 percent. U.S. Bureau of the Census, Statistical Abstract of the United States: 1994 622 (1996) [hereinafter Census: 1994].

67. STOVER, *supra* note 33, at 134-43.

68. John Jacob Astor, who died in the Titanic disaster in 1912, predicted that “an age of air travel will soon be possible.” *Id.* at 143.

69. *Id.* at 147.

70. CENSUS: 1994, *supra* note 66, at 622. While airlines flew 367 billion passenger miles in 1992, for 17.7 percent of total, railroads, including intercity (Amtrak) and rail commuter service, ran up 14 billion passenger miles, for .7 percent of the total. *Id.*

## IV. 19TH CENTURY CULTURE

A. LAISSEZ FAIRE AND THE MOVEMENT FROM CHARACTER  
TO PERSONALITY

In earlier sections of this paper the path of modern culture was traced through the 18th Century. It was observed that humans refashioned themselves so that each one's own choice tended to become the controlling factor in development, economic and spiritual (but not so much social or cultural). The manifestations of this revolution were sketched as they played out in the rise of capitalism, and more specifically, in the rise of the railroads, industrial capitalism's first really grand offspring. And we see how, by the 1880s, a kind of counter-revolution took place; economic laissez faire, a spent force, was no longer socially acceptable. To understand why our culture is very often dross and why the law supports it, we need to consider the 19th Century's application of laissez faire, not in the economic realm, but in the cultural realm, where again the railroads were critically influential. It is asserted here that as certainly as laissez faire had socially unacceptable effects in the economic realm, so too did it in the cultural realm, and it still does.

In his stimulating 1990 book *The Republic of Choice*<sup>71</sup>, Lawrence Friedman described the social and popular underpinnings of Western legal systems. Friedman observed that although the 19th Century is often associated with freedom, the extensive liberty of the citizen applied most notably to aspects of economy (as a reaction to the mercantilistic monarchies) and polity. The American argument for self-government visualized, most certainly, the abolition of kings and aristocracies; in the 19th Century people (white men, mostly) were free to vote, and they were legally free to make and take employment with very little government restraint. There were zones of open choice for people with the strength and maturity to choose correctly.

But 19th Century American society did not visualize a radically different social - as opposed to economic - order from the 18th Century in matters of family, leisure, moral norms and ways of life. In private life, society had certain rigorously enforced expectations. Sex, marriage, divorce, and family life were "fettered by custom and law."<sup>72</sup> Men (and women, in their place) were expected to be God-fearing, hard-working, disciplined and traditional.<sup>73</sup> They were expected to exercise "massive self-control, temperance and moderation in all things"<sup>74</sup> and to control

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71. FRIEDMAN, *supra* note 6.

72. *Id.*

73. *Id.* at 37.

74. *Id.* at 27.

Since the child's initial job would be as an employee, ready obedience and disciplined

(or conceal<sup>75</sup>) deviant desires and impulses. According to Friedman, “nineteenth-century democracy, outside the economic sphere, continued to assume a code of traditional personal values and to value moderate, respectable behavior which did not offend time-honored norms.<sup>76</sup> People were not generally free to choose a particular way of life; rather, “they were trained to accept a preformed, pre-existing model.”<sup>77</sup> Those who did not conform were dealt with harshly - the poor, unemployed, sick, unfortunate, deviant, mentally ill, criminally inclined, were punished.<sup>78</sup>

Sustaining these traditional norms in an open society, where the kings and bishops were long gone or deconsecrated, was the pressure of small-town conformity, the small social and geographic scale within which people lived and worked “[g]ood morals had their source in close-knit families, in surrounding institutions such as the church and in the cohesion and solidarity found in village life. Bad morals came from peers, from “society,” from horizontal transient groupings.”<sup>79</sup> Before the railroads, travel beyond the boundaries of a hometown or region was uncom-

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habits . . . were essential. Writing in 1871 on Gentle Measures in the Management and Training of the Young, Jacob Abbott exemplifies the continuing emphasis on early training in obedience ‘on the principle of simple submission to authority.’ In terms such as ‘every child ought to be trained to conform his will to the demands of duty,’ such advice was repeated by many writers . . . . The idea of training for ‘character’ in general was also closely tied to the aim of success in business . . . .

THOMAS C. COCHRAN, BUSINESS IN AMERICAN LIFE: A HISTORY 172-73 (1972).

75. FRIEDMAN, *supra* note 6, at 32.

76. FRIEDMAN observes that the Victorian upper classes (and later the American Prohibitionists) were not merely hypocritical when they approved of legislation making adultery, cohabitation, fornication, drinking and gambling illegal, even if they themselves sometimes practiced these vices. The Victorians knew people did these things; the point of the legislation was to keep such activities underground, to keep sin in its place, to keep it from being a social problem, to delegitimize it. *Id.* at 144.

77. *Id.* at 30. From 1826 to 1834 Lydia Maria Child published a children’s magazine, delivered by the postman, entitled *Juvenile Miscellany*. The magazine enjoyed huge popularity with its didactic exhortations to children to live an industrious, sober life. Titles include “The Industrious Family” which “presents poverty as a temporary reverse that hard work and frugality can always overcome . . . . In this favored land, no one, who is blessed with health, and willing to be industrious and economical, need be destitute of the comforts of life.” Over and over the stories praised the virtues of hard work, frugality, deference and obedience to authority. The obvious sexual stereotyping and unconscious but “unrelieved subordination of women to men” in the stories did not offend subscribers. However, starting in 1830 Child began to espouse the anti-slavery cause, and readership fell off dramatically. Years after the magazine’s demise adults recalled fondly the magazine’s influence which was “ennobling & purifying, & elevating & stimulating to benevolence and charity.” CAROLYN A. KARSHER, *Lydia Maria Child and the Juvenile Miscellany: The Creation of an American Children’s Literature*, in PERIODICAL LITERATURE IN NINETEENTH CENTURY AMERICA 90, 99, 107-08 (Kenneth M. Price & Susan Belasco Smith eds., 1996).

78. FRIEDMAN, *supra* note 6, at 33.

79. A strict and, to visiting Europeans, remarkable new institution was invented in the United States to deal with deviancy: the penitentiary, “models of stern but salutary order” that were regimented, paternal, rigidly disciplined. *Id.*

mon; mostly people traveled by walking. The influence of one's community was inescapable and unrelenting.

By the late 19th Century, just as *laissez faire* began to fade from the economic realm and government began to project its positive power through the Commerce Clause to control business, redefinitions operating in the opposite direction, still propelled by the influence of the Enlightenment, began to affect the individual realm. Constraints on the individual shrank more and more; what was becoming important was not so much the development of character as of *personality*.<sup>80</sup> In the 20th Century the emphasis is on self-development; the business of life is to develop one's full potential, to become a complete person, to opt for a complete expression of the person, to unfold all there is to be. The "idea of personal autonomy . . . is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout all their lives."<sup>81</sup> The regnant idea is that people should be the authors of their own lives, that relationships should be structured contractually rather than through time-honored customs and mores, that people should not be forced into fixed social roles decreed by tradition and fixed at birth. Inheritance and ascription are eschewed; the door is open to freedom, mobility, and choice.

#### B. OPTIONS WITHIN REASONABLE REACH - THE RAILROAD

This change from character to personality was made possible in the 19th Century by the railroad; this change and its portents were really the nub of the Modern Problem. The first necessary circumstance for humans to make was the removal of religiosity as a constraining influence. That was accomplished in the 18th Century. People then stood receptive to embrace a range of choices that could make them anew. But receptivity was not very useful without some stimulus (or, as Friedman put it, "[o]ptions have to be with reasonable reach"<sup>82</sup>), and the constraining factor in the 19th Century was lack of stimulus, or of options within reach; the railroads changed that. A child born in northern New York in 1830 could hardly choose to repudiate his parents' authority, or his pastor's, or school teachers', or assume a novel career or join a new religion. There were no other authority figures; there were no novel careers, and the idea that a person could choose or change his religion would seem extremely exotic, if not dangerous. There were no other reli-

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80. *Id.*

81. O.J. Simpson, as a defendant in a wrongful death suit, was asked by a plaintiffs' attorney if he considered himself an actor. "I don't think I've ever called myself an actor in my life," Simpson replied. "I have always said that I was a personality." Jeffrey Toobrin, *The Simpson Civil Trial*, NEW YORKER, Dec. 9, 1996, at 60.

82. FRIEDMAN, *supra* note 6, at 44.

gions readily at hand; and only with great effort could a person leave his home town, burdened and freighted (if not blasted) as it was with filial expectation and the pressure of conformity. Almost impinged upon the senses of a 17 year old boy or girl in the rural early 19th Century United States except what was filtered through their parents, their teachers, their pastors, or their friend's parents.

The railroad's role as a medium carrying the ideas of a liberating consciousness was replaced by automobiles, airplanes, telephones, radio, television<sup>83</sup>, and now the Internet. In its day, however, there was nothing to beat the railroad. Today we have all of this technology, but the railroad was first, and for a long time, alone. "From the end of the Civil War until the beginning of the First World War, the railroad was a central, if not the major, element in the political, economic, and social development of the United States."<sup>84</sup> How the railroads put options within reach is traced here; what the options came to be, is the 20th Century's inheritance and burden, the new Modern Problem.

### 1. *The Railroads and Reading*

A very important thing the railroad did to affect "the republic of choice" was to encourage reading. Reading on the train was enormously popular among all classes of travelers because it obviated the necessity to converse with the person next over who - unlike on the stage coaches - would be a travelling companion for only a short time.<sup>85</sup> The sale of reading material, especially periodicals, to travelers became a big business. Ralph Waldo Emerson delivered an address on "The Fugitive Slave Law," in New York City on March 7, 1854; he reflected on the dissemination of his ideas:

For who are the readers and thinkers of 1854? Owing to the silent revolution which the newspaper has wrought, this class has come in this country to take in all classes. Look into the morning trains, which, from every suburb, carry the business men into the city to their shops, counting-rooms, work-yards and warehouses. With them enters the car - the newsboy, that humble priest of politics, finance, philosophy and religion. He unfolds his magical sheets - twopence a head his bread of knowledge costs - and instantly the entire rectangular assembly, fresh from their breakfast, are bending as one man to their second breakfast. There is no doubt, chaff enough in what he brings, but there is fact, thought, and wisdom in the crude mass, from all

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83. *Id.* at 99.

84. Television is boldly going where no railroad went before. Taking advantage of deregulated telecommunications and media markets, television is spreading its allure to young people around the world. "Even in Vietnam, the message is being felt: What you wear and how you look is important." Smillie, *supra* note 19.

85. KOLKO, *supra* note 53, at 1.

regions of the world.<sup>86</sup>

Contemporary observers held that “reading will remain the most natural occupation of railway travelers, in this new form of locomotion that has so profoundly altered the travelers’ relations to one another.”<sup>87</sup>

More important, even than providing a socially acceptable venue for reading, the railroads carried the mail that supplied newspapers and magazines to every mailbox in the country. In 1838, the U.S. government declared that every railway in the United States was a post route.<sup>88</sup> The action encouraged railroad building, but more importantly it provided a fast, regular vehicle of conveyance for periodical literature, for the spread of ideas. Richard Kielbowicz traces the carriage of colonial and U.S. mails from 1700-1870 in his *News in the Mail*.<sup>89</sup> The volume of mail delivered, most of it newspapers and magazines, increased enormously with the coming of the railroad.<sup>90</sup> The railroad carried the mail that carried the trade journals that promoted advancements in machine technology to make the stuff of modern civilization; the railroad carried the advertisements and mail-order catalogues that promised rural and small town Americans that they could look and dress and talk like people they never saw in person. The railroad carried the entire production of early 20th Century American industrial output, providing the goods necessary to satisfy the material desires generated by the new consumer industries. The railroads carried the mail that carried the installment credit correspondence. The spread of installment credit did more than anything else to demolish the Protestant work ethic.<sup>91</sup>

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86. WOLFGANG SCHIVELBUSCH, *THE RAILWAY JOURNEY: THE INDUSTRIALIZATION OF SPACE AND TIME* 68 (1986).

87. RALPH WALDO EMERSON, *THE FUGITIVE SLAVE LAWS*, IN *THE COLLECTED WORKS OF RALPH WALDO EMERSON* 11/218 (Edward W. Emerson, ed., 1906).

88. SCHIVELBUSCH, *supra* note 85, quoting an (unnamed) contemporary medical doctor in *The Influence of Railway Travel on Public Health* (ca. 1860).

89. HANEY, *supra* note 2, at 239.

90. RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION 1700-1860s* (1989).

91. In 1847 the 2400 residents of Crown Point, New York (240 miles north of New York City), received 487 subscriptions to 66 periodicals, 39 percent of which came from New York City; ten years later, 57 percent of the periodicals brought into Crown Point came from New York. The *New York Tribune* was a daily paper, but specialized magazines (from Boston and Philadelphia, especially) were popular, including those dealing with religion, farming, cultural affairs, medical cures, reform movements, fashions, and childrens’ activities. *Id.* at 111. In the South, Rocky Mount, North Carolina “sat along a rail line that carried two mails daily”; so favored, 208 readers in the town consumed “408 subscriptions to 94 newspapers and magazines” in 1859-60. The *New York Times* boasted in 1860 that the new express railroad “will make the whole country between this and Albany merely a suburb of New York, as far as the supply of morning newspaper is concerned.” *Id.* at 102. By 1850 railroads were the preeminent vehicle for mail transportation. Kielbowicz relates postal audit figures showing that between July 1, 1851 and June 30, 1852 the post office carried 95.8 million letters, 87.7 million newspapers and other

In short, the railroad carried the mails that provided a window to a whole new world; in the mail, carried by the railroad, the new post-Enlightenment culture was disseminated. Here for the first time in history, the average person, now the Enlightenment personality, exhilarated by the possibilities of liberation, could read about immediately contemporary happenings, the new ideas and philosophies, every day. And more than just news was available; magazines full of articles, editorials, commentary, analysis, stories, travelogues, cartoons, anecdotes and - very powerfully - advertisements that made people realize they had choices in life, that in other places people were doing things differently, and that they could do things differently too.<sup>92</sup>

## 2. *The Railroads and People to Gawk at; Identities to Assume*

Railroads not only presented people with periodical literature that opened new horizons for them, it also carried people and presented them with throngs of other people, strangers to examine, mingle with, watch, emulate, comment on, prey upon, con and assault in various ways. Here were educated Northeasterners, black slaves (before the Civil War), merchants, genteel Southerners, entertainers, business men, women (much to the surprise and alarm of some men, who considered it unseemly for women to travel on trains and mingle with "dirty emigrants or lowland homespun fellows in petticoats or breeches"<sup>93</sup>); here were people

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periodicals, 3.5 million pieces of franked matter, 7.1 million exchange newspapers (circulated between newspaper offices at no charge) and some 20 million papers circulated free within the county of publication. Of this printed matter 55.3 percent was delivered by the post office and 107.7 million pieces were periodicals, most of which were carried by railroads at some stage in their journey. *Id.* at 107.

92. American culture was once a mass marketer's nightmare. "Frugality and thrift were central to the famed 'Puritan Ethic . . . .' The Puritans believed in hard work, participation in community, temperate living, and devotion to a spiritual life. Their basic rule of living was that one should not desire more material things than could be used effectively." DAVID KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 150 (1995). Mass consumption, which began in the 1920s, was made possible by revolution in technology, principally the application of electrical energy to household tasks (washing machines, refrigerators, vacuum cleaners and the like), and by three social inventions: "mass production on an assembly line, which made a cheap automobile possible; the development of marketing, which rationalized the art of identifying different kinds of buying groups and whetting consumer appetites, and the spread of installment buying, which, more than any other social device, broke down the old Protestant fear of debt." DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 66 (1976). William Leach observes that "a system of easy credit was created to speed up consumption" WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 123-24 (1993).

93. One of the most popular and influential periodicals at mid-century was the *New York Ledger*, edited by Robert Bonner. The *Ledger's* appeal to a remarkably broad readership, working-class people as well as senators and college presidents, was sharpened by four factors: it was cheap, contained a variety of material, had excellent writers, and had famous and highly paid contributors. Fanny Fern (Sara Farrington) was a regular contributor from 1856 to 1872. Flourishing under the famous and uncensuring editor Bonner, Fern became the most highly paid



from every class and region.<sup>94</sup>

### 3. *The Railroads and Separation of Production from Consumption*

And there was another aspect of the “railroadization” of the United States that had a profound effect upon our civilization’s development - railroads contributed enormously to the separation between production and consumption. Before the railroads, transportation systems in the United States were primitive and, most people knew where the goods came from; “because they themselves produced them, knew their value, and understood the costs and sufferings required to bring them into existence.”<sup>95</sup> But with railroads came a new relationship between production

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columnist in the United States (in 1855 Bonner paid Fern \$100 a column). Joyce W. Warren, *Uncommon Discourse: Fanny Fern and the New York Ledger*, in *PERIODICAL LITERATURE IN NINETEENTH CENTURY AMERICA* 51, 56 (Kenneth M. Price & Susan Belasco Smith eds., 1995.) The paper’s circulation, bolstered by the sensationally popular writer, rose from 180,000 in 1856 to 400,000 in 1860. Fern had unconventional ideas and Bonner’s *Ledger* carried them to a vast readership. First she thought that she, a woman, could make a living in a man’s business: “I have made my fortune in the world, and taken care of myself” Fern said with pride, “and thanks to nobody.” *Id.* at 55.

And she wrote about things that other writers, and most certainly women, did not. Fern used her widely-read column to argue for women’s suffrage, and dismissed those who objected to it on the grounds that voting would cast women “into the rowdy company of both sexes” at the polls: “Pshaw!” she scoffed, women see all types of people every day on the streets, in stores, and in other public places. “All such talk is humbug, as the men themselves very well know. We are always ‘dear - delicate fragile creatures,’ who should be immediately gagged with this sugar plum whenever we talk about that of which it is their interest to keep us ignorant.” *Id.* at 62.

Fern also supported women doctors, wrote in favor of divorce, and told women not to be held back by the forces of mere tradition, which urged for them

no higher aim in life than an eligible matrimonial establishment; no career, as have their brothers, to look forward to; but merely, like a pretty statue, to sit still and be admired . . . Can I be a governor? Can I be a senator? Can I even be President? Bah - you know I can’t. *Free?* Humph!

*Id.* at 63.

Eventually women gained the right to vote and to be doctors and to divorce. We have women governors and senators, at least.

94. SARAH H. GORDON, *PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE 1829-1929* 98 (1997) (quoting an 1835 traveler Samuel Beck).

95. Many of these railroad travelers were very rowdy. *Id.* at 92-103. They thrust heads, arms and legs out the windows, they hung on the outside of the cars, they rode on the roof or in the locomotive, they jumped on and off slow-moving trains at will; at stops, scheduled or otherwise, they urinated and defecated with little attempt at modesty (there was no modesty available), they stole fruit from orchards. *Id.* They smoked, they spat tobacco, they made sexual advances, they talked business, they read, they watched their fellow passengers, they slept and ate. *Id.*

Less rowdy were the group travelers that asked for discount fares to ride to conventions, such as the Women’s Christian Temperance Union, the YMCA, the National Education Association, the Wholesale Merchants of Chicago, and the Grand Army of the Republic. Such requests reached “flood tide” in the 1880’s. *Id.* at 180. Also reasonably orderly were political whistle-stop campaigners and reformers.

The women’s movement gained much of its momentum in this way, through the hun-

and consumption - production could occur in one place, finished goods were transported hundreds of miles, and displayed for consumption with no hint of the work required to bring them into existence. As the cost of production was intentionally hidden by merchandisers<sup>96</sup> the fantasy of consumption as a paradise free from pain and suffering, and so guiltless and costless, flourished. (Today, of course, the hidden producers often labor in foreign countries.)

#### 4. *The Railroads and Urbanization.*

The railroad achieved another effect; it created the city as we know it, and finished off the political and cultural influence of small towns and rural areas.

With urbanization, or more especially modern suburban sprawl, we see the most obvious consequences of the "Enlightenment Project" and the objectification of the earth (though rural slag heaps and deforestation are good examples too). Nineteenth Century Americans realized early that the railroad could lay the earth low, tame it, level it, subjugate it. The railroads - as the phrase was - "annihilated time and space."<sup>97</sup> The further modern man is removed from any effective sense of societal ethics, of an organic sense of belonging to place, the more deconsecrated the earth becomes, until it seems, for the most part, that the only point to "progress" (the further appropriation of the non-human world) is making money to buy more progress.

Because the railroad with its fixed capital was most profitable when it served the largest number of people, railroad companies pressed to extend their tracks further and further, from coast to coast; the railroads intentionally encouraged people to settle in new places. A pattern of urbanization emerged. Cities like Chicago, Minneapolis, Detroit, St. Louis, Cincinnati, Memphis, and Seattle matured; established cities such as New York grew even larger. Small towns lagged behind.<sup>98</sup>

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dreds of thousands of miles traveled in railroad cars, to all states, by suffragists such as Susan B. Anthony and Elizabeth Cady Stanton, municipal reformers such as Jane Addams and Alice Hamilton, and temperance advocates such as Frances Willard. The American Federation of Labor, and of course the American Railroad Union both brought local union chapters and brotherhoods under a national organization made possible primarily because of the railroad.

*Id.* at 181.

In short, the railroads presented travelers with whole worlds of fellow travelers to gawk at, marvel at, emulate.

96. LEACH, *supra* note 91, at 147-50.

97. *Id.* As late as 1875 New York department stores still "conducted manufacturing and selling in the same place, in full gaze of customers." *Id.* at 147. That was all changed by 1910.

98. The term, seen frequently in railroad literature, may have first been used by a passenger "signing himself 'Jockey of York,' who had been one of 141 passengers on an 1830 Christmas outing over the Charleston and Hamburg Railroad." WARD, *supra* note 39, at 110.

The process of urbanization accelerated in the 1880's and 1890's when the railroads began to standardize their operations and merge their lines. Small towns were completely left out of the high-speed runs between Boston and Washington, New York to Chicago, Chicago to New Orleans. These trains - The Twentieth Century Limited, the Broadway Limited, the Orange Blossom Special, the Miamian, the Gulf Coast Limited, the Everglades, the North Coast Limited - traveled at 60 miles per hour, and "in the name of speed and efficiency many small towns found themselves bypassed in the rush to connect major metropolitan areas by rail."<sup>99</sup> Bypassed, the small towns lost economic, social, cultural, and political influence.

With urbanization and all its lures and distractions came the dissolution of small-town authority. To escape to the city was to be free from the desolate intolerance and narrow-mindedness of small towns.<sup>100</sup> Cities provided glorious anonymity that made it possible for people to assume a new identity of self-expression, modeling themselves on what they read in magazines or on what they saw in the city; anonymity also required that people display their consumption in order to establish social status.

One result of the growth of cities was the advance of fashion as a popular pursuit. Anonymity in the crowd was one new result of urbanization, and fashionable clothes provided an opportunity for people to express themselves in their daily business . . . . Dress in the city street was a performance, a subtle indicator of calling or leisure activities, hinting at sexual proclivities as much as rank, and symbolizing countless allegiances. For men as well as women, to dress in fashion was to make a statement about yourself and your aspirations.<sup>101</sup>

The concentration of large numbers of people made the distribution of a daily press practical, with all its news, gossip, scandals, fashions and advertising. Motion pictures - certainly one of the most powerful tools of social change - became profitable and practical "more because of the social organization of the modern industrial city than as a result of any properties inherent in the technology itself . . . . Hollywood provided the prototype for a new way of life, teaching the United States the fashiona-

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99. GORDON, *supra* note 93, at 269.

100. *Id.* at 273. The same thing happened, of course, with the advent of the interstate highway system in the 1950's and early 1960's: many small towns along Route 66 or Highway 99 disappeared as important stopping points. *Id.*

101. Richard Posner observes that homosexuals move from small towns (where they cannot practice homosexuality for lack of partners and lack of anonymity) and tend to congregate in cities, where there are lower "search costs" for relationships, sexual and non-sexual, than in small towns. "The total number of practicing homosexuals in a society will therefore increase with the rise of cities, making homosexuality seem, and in a valid if partial sense be, a by-product of economic development and modernity." RICHARD A. POSNER, *SEX AND REASON* 127 (1992). Prostitution increases with urbanization, for the same reasons. *Id.* at 133.

ble pleasures of conspicuous consumption."<sup>102</sup>

The signals that bombarded Americans in the new cities of the new century presented people with an enormous stock of information. There were so many models and cues that people no longer felt they "must stick with the old, inherited models and codes of the primary group."<sup>103</sup> Among the old models and codes that disappeared was the entire small-town relationship that characterized life in most of the United States; as the cities grew, small towns and the small-town mentality and concept shrank:

Railroads, which affected the economic and social order in virtually every American community, took away local people who had to move in order to support themselves. Strangers began to replace the web of family relationships that distinguished each community. Undercut were the distinctly local patterns of town and farm life which emphasized loyalty to family, land, and town institutions. In their place came a new emphasis on mobility, capital, investment, and industry.<sup>104</sup>

The previously-existing integrated social pattern, emphasizing character, self-restraint, and self-control, was fundamentally inconsistent with capitalism as it developed; the old order was eschewed.

## V. TWENTIETH CENTURY CULTURE

### A. A NEW SOCIAL ORDER

By the beginning of the 20th Century the railroads' work for good or bad was nearly finished. They had brought about "a new social order in the United States . . . overwhelmingly based on the principle of national commercial exchange."<sup>105</sup> A social order based on national commercial exchange means the triumph of big business over small, the erosion of traditional values, and the celebration of materialism and consumption. This is the real Railroad Problem. It is still not addressed.

#### 1. *Big Business Over Small*

A social order based on national commercial exchange means that selling and buying becomes the most important thing in society; those who can sell and buy most efficiently become the most important people

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102. RICHARD MALTBY, *POPULAR CULTURE IN THE TWENTIETH CENTURY* 30-31 (1988).

103. *Id.* at 36.

104. FRIEDMAN, *supra* note 6, at 128.

105. GORDON, *supra* note 93, at 45. Gordon quotes Nathan Hale (father of Edward Everett Hale [1822-1909], the famous American Unitarian minister) who attempted to describe to Boston business interests the importance of the railroad. At a town meeting in that city in 1831 he declared that "'if people could come from Springfield to Boston in five hours an average of nine people would come every day.' At the time the prospect of nine strangers coming to down daily seemed an impossibly high number." *Id.* at 49. This was the city of Boston!

in society. They project their value system effectively, and their businesses become the most important ones. Those who cannot sell and buy efficiently become less important. Money is the measure of all things. Because success in making money becomes invaluable, old-fashioned values, "the major constituents of real cultures - family, religion, ethics, manners, impersonal criteria for distinguishing between truth and false - shr[i]nk almost to the vanishing point as authorities over individual behavior."<sup>106</sup> Unencumbered by the constraints of custom, economic or cultural, the railroad raised up a civilization that "thrust aside the traditional efforts of men to withhold the world from men,"<sup>107</sup> putting a vast new array of options within reach. But it also created a regime that, all over again, withheld the world from men; it dashed the entrepreneurial expectations that the Enlightenment had enshrined among the Rights of Man. Frank Norris said of the Southern Pacific that it was a frightful, all-consuming octopus.<sup>108</sup>

No longer did people control their own business affairs. "Business deals great and small hinged on what railroad promoters, sitting miles from the scene, might decide,"<sup>109</sup> and the livelihoods of hundreds, even tens of thousands, of people were directly affected by decisions about railroad courses, though these people had nothing to say about it. At the local level, discrimination against localities, usually the result of local competitive factors, affected "the economic well-being of every member of a community."<sup>110</sup> Some businesses and some localities were just out of luck: on the wrong side of the tracks. And the railroads

distorted the competitive process and limited equality of opportunity in many businesses. They denied the equal right of small dealers to participate effectively in an open market, and they prevented the independent shipper from choosing his own outlet by dictating the destination of his produce by means of the rate structure.<sup>111</sup>

The aggregation of business in cities (promoted by railroad rate discrimination) gave large businesses an advantage over small ones - the small businessman could no longer count on local custom; his personal attention to detail became less important, the small capitalist and independent businessman were crushed out, the distinction between employer and employee became more pronounced, capitalization requirements increased, and workers could no longer hope to become the

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106. *Id.* at 64.

107. Christopher Clausen, *Welcome to Postculturalism*, 62 KEY REP. 6 (1996).

108. MARTIN, *supra* note 3, at 31.

109. Norris' famous novel *THE OCTOPUS: A STORY OF CALIFORNIA* appeared in 1901. It related, with only some artistic license, he abuses of the Southern Pacific Railroad.

110. MARTIN, *supra* note 3, at 26.

111. GEORGE H. MILLER, *RAILROADS AND THE GRANGER LAWS* 20 (1971).

employer of their own labor. The largest and most unscrupulous businesses got the best railroad rates, for they could demand them and threaten any railroad that did not cooperate with ruinous withdrawal of their business. Railroads changed markets from local to national or international; if a few producers over-supplied, prices fell and railroad charges were reduced to unremunerative levels to retain business because competition was fierce. This led, reasonably, to an interest in inter-railroad rate agreements ("combinations in restraint of trade," to use the Sherman Act's terminology), in pooling and consolidation so that the roads became concentrated in a few hands.

And these railroad owners, riding in their luxurious private cars, and living in palaces of oriental opulence

came more and more to be removed from the communities they served, and less and less concerned about their welfare. Railroads "arrang[ed] passenger schedules and connections to suit their financial interests, and [the railroad magnates] became known for their high-handed manipulation of city and state governments for their own ends."<sup>112</sup>

These business leaders commanded vast enterprises and undreamed-of riches; they were the new emperors of the day.<sup>113</sup> Commodore Vanderbilt stitched together "a stupendous property," a transfer of capital "in the classic style";<sup>114</sup> Governor Henry Haight of California did not deny that these "combinations of capital execute works of great public utility" but, he said, "we object to their conversion into agencies for public plunder and we also object to placing the government in the hands of their managers and making the people their serfs and tributaries."<sup>115</sup>

Henry Carter Adams, an economist and political scientist at the University of Michigan observed that "the tyranny of corporations, which grew naturally from conditions of 'industrial freedom,' was as grievous as any tyranny ever established by government agency,"<sup>116</sup> including those pre-Enlightenment government agencies controlled by the Church. Voltaire's "priestly despotisms" were gone, but now it seemed they were replaced by railroad-boss despotisms. And to what purpose did the new empires exist? The purpose of the railroad was, of course, to make money,<sup>117</sup> the heart of commercial exchange. The self-interest of a few,

112. *Id.* at 22.

113. GORDON, *supra* note 93, at 111.

114. The emperor of Austria-Hungary, Franz Joseph, was tardy for a meeting with the railroad magnate Edward H. Harriman. The emperor apologized; Harriman responded that it was all right, "I, of all people, know the problems of empire." WARD, *supra* note 23, at 151. Bill Gates is today's equivalent, with his palatial house and, like Rockefeller and Carnegie, his philanthropy.

115. MARTIN, *supra* note 3, at 57.

116. Governor Haight in 1871, in Deverell, *supra* note 45, at 30.

117. ADAMS, *supra* note 31, at 66.

magnified and projected by the railroad, and *unrestrained by any traditional countervailing influences*, affected the general interest. One man's ego, laid out across the land, over chasms and through mountains, propelled across thousands of miles by track and steam, affected millions of people.

Yes, the railroads created new cities with great opportunities for the new urbanites, but they often ruined small towns. For all that was gained, much was lost “[d]uring the quarter century after 1873, Americans had been forced to come to terms with an accelerating sense of loss of control over their destinies, as those familiar “island communities” that had structured an earlier way of life were seen to be rapidly fading away.”<sup>118</sup> The railroads brought new “options within reach,” but they also cut out options. It was feared that the new giants of industrial civilization would squeeze the independence out of farmers<sup>119</sup>, small manufacturers and merchants, shopkeepers and consumers and make the populace “their serfs and tributaries.”

## 2. *The Erosion of Traditional Values: Money Talks*

A social system based on national commercial exchange means that big business tends to squeeze out small business. It means that *money talks*, and little else does. This crassly-worded philosophy has significant further implications, some of them not immediately apparent. Among these is the erosion of traditional values, the idea that society should not disapprove of any “lifestyle.” Anything goes.

In a broad cultural sense “money talks” is very much a post-Enlightenment capitalistic concept that we readily accept, because, in theory, money can be made by anyone who is hard working, imaginative, and lucky. Skin color, national origin, gender, handicap, age, social class, and religion do not, in theory, matter.<sup>120</sup> If those traditional ascriptions and

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118. “[T]he principal object of the construction of the Pennsylvania Rail Road, was the promotion of the mercantile interests of Philadelphia.” WARD, *supra* note 39, at 139-40.

119. HORWITZ, *supra* note 32, at 65.

120. Of all the businessmen in the 19th Century, none complained more bitterly than farmers (of whom there were many more in the 1890s than there are in the 1990s), whose problems included excessive indebtedness, high interest rates, post-war inflation, heavy and inequitable taxes, low commodity prices, lack of representation in Congress, declining social position, inadequate agricultural educational systems, rural isolation and, most galling of all, utter dependence upon railroads, whose rates were set in eastern cities by multimillionaires. BUCK, *supra* note 31, at 41. The farmers organized, agitated and lobbied, creating in less than ten years a powerful social and political organization, the Grange. This organization, founded in 1867 by Oliver H. Kelly, had as an early goal lobbying the state and federal legislatures, relentlessly demanding railroad regulation. Revisionists dispute that the Granger movement, properly defined to refer to members of the Grange, really had very much to do with the granger laws; the modern interpretation tends show “the relative insignificance of the Patrons of Husbandry, or the Grange as it is more commonly called, in the struggle to regulate rail carriers.” D. SVEN NORDIN, RICH

place-putters no longer control, why, it is asked, should any, such as sexual orientation, marital status, or occupation? If money talks, a woman with money is no less respected than a man, a homosexual no less respected than a heterosexual, a black man no less respected than a white man, a war profiteer than a car salesman, a pornographer than a grocer.

A social order based on national commercial exchange thus means that people are not bound by traditional constraints because these constraints are not relevant. Moreover, people sense they have an affirmative right to the general societal acceptance of their "lifestyle," however non-traditional, because modernism and capitalism eschew restraints, ascription, putting-in-place, and formalism, and promote equality and toleration. When the railroads showed a new range of possibilities, people saw they did not have to be old-fashioned any more. If people do not want to be old-fashioned, if they want to make or re-make themselves, the law will accommodate, and has accommodated.

Because "all normative standards of behavior and achievement are fading away,"<sup>121</sup> the people are sovereign; our system views their ideas as good. Law is, to some extent, an instrument; it bends to the peoples' will; it is an instrument that "constituent parts of society can manipulate deliberately for personal or social ends."<sup>122</sup> To the extent that we are not Anglo-Saxon, heterosexual, Protestant, male, or heir to money, we like modernism's equal opportunity; immigrants come to the United States where their immutable characteristics do not limit opportunity for success. To the extent that we have an attribute that is now devalued, we resent the intrusion of upstarts and the erosion of standards.

A social order based on national (and now international) commercial exchange contributes, at least, to the loss of traditional values and to the expansion of non-traditional rights; this, and the recognition that the law is complicit in this loss, is disquieting (what Mark Helprin complained about<sup>123</sup> - society is going to hell in a handbasket). In this system, what

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HARVEST: A HISTORY OF THE GRANGE: 1867-1900 vii (1974). Farmers did demand regulation, but not especially through the Grange organization.

121. The fundamental categories of Enlightenment thought that parallel the market economy are the primacy of contract as the method for ordering human affairs (including the social contract for ordering the relationship between government and governed); equality as between parties to a commercial transaction (the act of exchange is essentially democratic); universality (the character of the buyer is of no importance to the seller, and the rules of the exchange are fixed by the system); toleration (religious and moral convictions of buyer and seller are of no importance); freedom (essential for the workings of the market economy) and property (the right to alienate the property, goods or real estate, that is the subject of the contract).

122. Clausen, *supra* note 106, at 6.

123. FRIEDMAN, *supra* note 6, at 22. Society has manipulated the law to obtain ever-greater rights for personal expression and free development. If gays want freedom from discrimination in housing and employment, they work through interest groups and lobbying to get the city council to approve a non-discrimination law protecting them. If they want to get married, they



does not contribute to commerce is old-fashioned, devalued, including peoples'

ability to commit themselves, to establish binding relationships, to sink permanent roots, to maintain continuity with previous generations, to remember, to make ethical judgments, to seek pleasure in work, to remain steadfast on behalf of principle and loyal to community or country (to the degree that community or country strives to be just and fair), to seek spiritual transcendence beyond the self, and to fight a cause through to the end.<sup>124</sup>

sue the state that denies them this right, and a court may decide that they can get married. If people want to live together unmarried, the law lets them (the mores of the society have indeed changed so radically in regard to cohabitation that "we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976). If they want to change their religion they can; probably it did not seem particularly remarkable to most readers of *Time Magazine* to learn that Microsoft mogul Bill Gate's wife "[I]s Catholic, goes to Church and wants to raise [their daughter] Jennifer that way. 'But she offered me a deal,' Gates says, 'If I start going to church - my family was Congregationalist - then Jennifer could be in whatever religion I choose.' Gates admits he is tempted . . . but he has not yet taken up the offer. 'Just in terms of allocation of time resource, religion is not very efficient,' he explains. 'There's a lot more I could be doing on a Sunday morning.'" Walter Isaacson, *In Search of the Real Bill Gates*, *TIME*, Jan. 13, 1997, at 51. "[I]n ancient times, they asked, 'Who is your God?' A generation ago, they asked your religion. Today your creed is a preference." Charles Krauthammer, *Will it be Coffee, Tea, or He: Religion was Once a Conviction. Now it is a Taste*, *TIME*, June 15, 1998, at 92. If people want to divorce for no reason other than incompatibility, they can; if they want to get abortions, or smoke marijuana, or have the right to die, the law retreats from prohibition. Of course, for every right there is a legally enforceable duty. After the demand for new rights, for blacks, women, gays, the handicapped, the old, the dying, come new laws. After new laws come law suits testing the boundaries and definitions of each law. One observer, reflecting on the use of the term "litigation explosion" as metaphor to describe the increase in number of lawsuits in the 1980s, observed that there was no "explosion"; rather, there was a steady increase in litigation. Jethro K. Lieberman, *Ruminations on a Crescendo of Litigation*, *NAT'L F.*, 6 (1991). This increase, and it has not abated, was not generated sui sponte by lawyers (despicable as the scores of raucous Yellow-Pages advertisements might be), nor is it reasonable to assume that much of it was generated by greedy, sweepstakes-mentality crazed plaintiffs. It was generated by regular people who had problems and sought legal redress. For a discussion of some aspects of the prevalence, or perceived prevalence, of litigation see FRIEDMAN, *supra* note 6, at 60-94. If women want to enter a historically all-male military academy, they can do so. *United States v. Virginia*, 116 S. Ct. 2264 (1996). Since 1971, the Supreme Court held, "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature - equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *Id.* at 2275. If fat people want to end discrimination against them in employment, in access to medical care and public facilities, if they want "the rights and privileges enjoyed by their friends and neighbors" they lobby and agitate for a change in law. Jan Rodak, *Large and Proud: Group Fights for Civil Rights for Fat People*, *THE BELLINGHAM HERALD*, June 24, 1997, at C1. The article describes a local chapter of the National Association to Advance Fat Acceptance and its efforts to end social and legal discrimination against fat people. *Id.*

124. HELPRIN, *supra*, note 8.

### 3. *The Triumph of Materialism*

To have a money-making business become the most profound influence in informing an urban civilization means the triumph of big business over small; it portends a cultural revolution where traditional values lose their importance, and it means the triumph of materialism. If commercial exchange is the driving force of society, then necessarily, to promote continued exchange, there must be continued consumption. With the rise of a "modern consumer society," people are driven by the conscious designs of marketing, to want material things, to consume.<sup>125</sup> People have always wanted material things, and it is nothing new to observe that we are going to hell in a handbasket. Every generation wrings its hands at the decline of decency.<sup>126</sup> But what is different, what is becoming apparent, is that the rate of decline is increasing due to the availability of what the railroads first presented people with: "options within reasonable reach,"<sup>127</sup> and the continuing lack of any generally-acceptable restraining influences. People inherently feel incomplete, unsatisfied; we yearn for more. Modern marketing wants people to believe that the yearning can be satisfied by consuming; people think that this is reasonable because society in general promotes little *else* to believe.

By the 1890's businessmen perceived that people developing "character" would not consume beyond traditional limits, but that those fash-

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125. LEACH, *supra* note 91, at 387. In this context, regarding commitment to one's own higher principles, continuity with previous generations, steadfastness to principle, seeking spiritual transcendence beyond the self, fighting a cause through to the end, it is disheartening to read what feminism may have become. Feminism used to speak to serious issues of women's rights, to the best aspects of the search for women's self-fulfillment outside the traditional roles ascribed by male-dominated society (equal employment, political, and economic rights). But now

much of feminism has devolved into the silly. [It offers] images of grown single women as frazzled, self-absorbed girls. Ally McBeal is the most popular female character on television . . . Ally spends much of her time fantasizing about her ex-boyfriend, who is married and in the next office, and manages to work references to her mangled love life into nearly every summation she delivers. She has fits in supermarkets because there are too few cans of Pringles.

Ginia Bellafante, *Feminism: It's All About ME!*, TIME, June 29, 1998, at 54.

Post-feminism has, certainly not completely, but to some extent, "degenerated into an excuse for media-hungry would-be feminists to share their adventures in the mall or in bed" or ala Linda Tripp (who tape-recorded the infamous Lewinski conversations) to denounce male hypocrisy.

126. This, indirectly, in its architectural manifestation is what Kunstler complains about. See generally Kunstler, *supra* note 10 (discussing the loss of community due to zoning). When money talks we eschew limitations on personal fulfillment, we also eschew limitations on material consumption (which are satisfied with credit cards if there is no cash in the bank), and, moreover, we fail to say "no" as well to the purveyors of this materialism and to the horrible strips and malls in which they sell their stuff.

127. It was a generation ago that Walter Lippman wrote, "We must find a way to re-establish confidence in the validity of public standards." LIPPMANN, *supra* note 20, at 114.

ioning their “personalities” would. So consumer-oriented capitalism was *consciously* developed.<sup>128</sup> John Wanamaker, the department-store empire builder, wrote that consumer capitalism “does not say ‘Pray, obey, sacrifice thyself, respect the King, fear thy master.’ It whispers, ‘Amuse thyself, take care of yourself.’ Is this not the natural and logical effect of an age of individualism?”<sup>129</sup> In a society where consumption is King everything must be new - why consume new if the old is still acceptable? Not to consume is to be old-fashioned. No one wants to be old-fashioned! We are driven to embrace modernity. Young people of the world are becoming “hook[ed]” on U.S.-style consumerism and by the often tawdry publications that promote consumerism. Certainly the railroads are no longer the vehicle for hooking people; now consumerism is promoted by global movies and especially television.<sup>130</sup>

Religion, art, culture, quietude and solitude, have all been pushed

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128. See *supra* text accompanying note 82. “This inflation of personality at the expense of external reality did not begin with the computer age . . . . Computers and their sibling, cable television, have, however, greatly accelerated the process.” Clausen, *supra* note 106, at 6.

129. At the turn of the last century it appeared that production was outstripping consumption:

[S]omething beyond dependence on the “natural laws” of supply and demand was called for to ensure [inventory] turnover. Businessmen would have to intervene more aggressively . . . by persuading and changing minds, by transforming the imagination . . . . It required the diffusion of “desire” throughout the entire population . . . . And money was not the decisive factor in building desire. “Without imagination, no wants . . . . Without wants, no demand to have them satisfied.”

LEACH, note 91 *supra*, at 37.

Leach points out that our present consumer culture was not chosen by people; it was, rather, forced upon us. It was not produced by the people, but by commercial groups bent on making profits and accumulating capital. And:

second, it was nonconsensual because, in its mere day-to-day conduct (but not in any conspiratorial way), it raised to the fore only one vision of the good life and pushed out all others. In this way, it diminished American public life, denying the American people access to insight into other ways of organizing and conceiving life . . . .

*Id.* at xv.

130. *Id.* at 3 (quoting the famous and pioneering department-store magnate). Individualism taken to the extreme is a sense of selfishness, a sense that rules designed to constrain others do not apply to me. On the contemporary sports scene of professional basketball and hockey “[t]he players, rather than working to win inside the rules, devote themselves to seeing how much that can get away with outside the rules.” Douglas S. Looney, *When Rule-Busting Becomes the Norm*, CHRISTIAN SCI. MONITOR, May 29, 1998, at B8. The reason for this disintegration of manners is easy to understand: the game officials “think a little violence, like dessert, adds to the enjoyment of the meal.” *Id.* The more enjoyable the meal, the more people will order it up, and the more money sponsors will spend on advertising during the games. Perhaps even more distressing than the trend here to see how much a person can get away with “outside the rules” is the reasonable consequence: an inability to understand that there even are any rules, or why there should be. Rules imply hierarchy, place-putting, the antithesis of the modern trend. So the traditional university lecture “is rejected as a form of bondage, an imposition of the lecturer’s view upon active minds forced into passivity.” Kenneth R. Stunkel, *The Lecture: a Powerful Tool for Intellectual Liberation*, CHRON. HIGHER EDUC., June 26, 1998, at A52. When “dress-down Fridays” at a business office expand to all week and degenerate into “short shorts, a

aside by a fixation with 12-mile-per gallon four-wheel-drive "sport utility vehicles," jet skies and snowmobiles, off-road vehicles that roar up and down upon the face of nature, the vast wasteland of television, AM radio, the Internet, and the violence and tastelessness of many movies. We can hardly, as a society, say no to any of it. We can hardly say no, not because the First Amendment protects freedom of speech (the freedom that liberates us and demeans us<sup>131</sup>) but because producers have convinced most of us that consuming from the smorgasbord of options brought within reach by modern technology gratifies us, and satisfies us.<sup>132</sup> We have, as a society, nothing else to turn to. We dismissed God 300 years ago, and now, "[i]nsofar as there is a dominant belief in our society today, it is a belief in the magic of the marketplace . . . that the common good is best served by the uninhibited pursuit of self-interest,"<sup>133</sup> which, we are told,

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halter top and flip-flop thongs" maybe things have gone too far. Phil Sahn, *Dress Gets a Little Too Casual at Some Firms*, BELLINGHAM HERALD, July 1, 1998, at C1.

131. For examples, MTV. The Music Television station is available in the U.S., Australia, India, Mandarin, Latin America, Japan, Brazil, Europe, Toronto. Smillie, *supra* note 19. As to the reach of global television:

The cumulative effect of initiating our children into a consumerist ethos at an ever earlier age may be profound. As kids drink in the world around them, many of their cultural encounters - from books to movies to TV - have become little more than sales pitches, devoid of any moral beyond a plea for purchase . . . . Instead of transmitting a sense of who we are and what we hold important, today's marketing-driven culture is instilling in them the sense that little exists without a sales pitch attached and that self-worth is something you buy at a shopping mall.

David Leonhardt & Kathleen Kerwin, *Hey Kid, Buy This!*, BUS. WK., June 30, 1997, at 62.

Perhaps hearteningly, the invasion of U.S. culture is not being greeted without resistance. Around the world various countries, Canada, Korea, France, among them are regulating the quantity of American content on tv and movie screens. But Hollywood moguls respond: "Attempts to promote [indigenous] culture while ignoring the demands of the market are doomed to fail." Gloria Goodale, *US Pop Culture Envelops Globe (Globe Not Entirely Pleased)*, CHRISTIAN SCI. MONITOR, Aug. 7, 1998, B1 and B6.

132. The author informed his introduction to law class that law was once a respected profession; he asked the class of 120 how many felt the law was today a respected profession. Not one student raised a hand. Justice O'Connor reflected upon the demeaning effect of advertising on the once-respectable profession of law:

I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. These cases consistently focus on whether the challenged advertisement directly harms the listener: whether it is false or misleading, or amounts to "overreaching, invasion of privacy, [or] the exercise of undue influence." This focus is too narrow. In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large. In particular, the States may prohibit certain "forms of competition usual in the business world," on the grounds that pure profit seeking degrades the public-spirited culture of the profession . . . . Commercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well.

*Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (O'Connor, J. dissenting) (citations omitted).

133. As Ralph Waldo Emerson said, "Things are in the saddle and ride mankind." The pop-

is consumption.

Perhaps the longest lasting, and currently most apparent, effect of the railroad (that is, industrialized-post Enlightenment) mentality as been alluded to before. It has “transmitted to nearly all cultures the radical modernist project of subjugating nature by deploying technology to exploit the earth for human purposes . . . turning nature into an object of human will.”<sup>134</sup> The earth is the victim; it has become an object to use up. Even today the railroads amaze us. The railroads’ bridges, tunnels, and trestles show man’s dominion over nature. So does one-hundred-fifty years of coal and iron extraction necessary to build and feed the railroad and the environmental ruination left from such activities.

Throughout history, there have been countervailing influences, to ameliorate the pressure to consume. The idea of people expressing themselves through market behavior was tempered;

people [used to be] guided by a set of moral principles that found expression in behavior outside the scope of the market mechanism. Deeply rooted in tradition, religion, and culture, these principles were not necessarily rational in the sense of presenting conscious choices among available alternatives. Indeed, they often could not hold their own when alternatives became available. Market values served to undermine traditional values . . . . What used to be professions have turned into businesses. The cult of success has replaced a belief in principles. Society has lost its anchor.<sup>135</sup>

William Leach, in his provocative study of the history of the American department store, quotes Samuel Strauss, who wrote an article for *The Village* in which he said,

In normal times there are spiritual goods which compete with the merchant’s wares automatically setting limitations upon the number of material goods that can be forced upon the community. Ours, however, have been abnormal times; for more than a century things have little by little been filling the stream of existence, little by little absorbing the place normally held by the imponderables, by religion, by art and culture. The fact is that capital’s appetite for profits, meeting with no restraint, has been literally eating its way into our right existence and throwing it all out of proportion.<sup>136</sup>

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ularity of jet skis or “personal water craft” seems a very good example of a piece of recently-introduced modern technology that is quite plainly and obviously absolutely unnecessary. Except that advertisers have convinced some people to buy such things, they would never exist.

134. Soros, *supra* note 18, at 48.

135. GRAY, *supra* note 23, at 178. A good example of subjugating nature to human will is the business, industry, of “swim-with-dolphin” programs. The idea is to capture dolphins, domesticate them, and allow (force) them to swim in fenced-off sea lagoons with humans for the latter’s entertainment and the enrichment of the program’s proprietors. Alex Salkever, *New Rules Revive Ecological Dispute Over Swim-with-Dolphin Programs*, CHRISTIAN SCI. MONITOR, Sept. 30, 1998, at 3.

136. GRAY, *supra* note 23, at 52.

It has been argued here that the cultural, legal, ethical, social, and economic system promoted by the railroads created a Railroad Problem that was only partially addressed in the 19th Century, and has not been successfully addressed in the 20th. The Granger Laws were the first attempt to deal with the Railroad Problem on a national level, but they only addressed specific abuses. These laws were not very effective because some of the "abuses" of the railroads, particularly their attempts to reduce inter-railroad competition, made sense, and because the fundamental Railroad Problem went far beyond those addressed. People were aware that the problem contained more than rate-setting, safety, pooling, and employee relations, but nothing could be done about it ("de-urbanization" - as the 1980s Cambodian Pol Pot's Khmer Rouge discovered - cannot be accomplished neatly); the railroad revolution cannot be undone by government. Modern revisionists suggest that the laws were worse than useless - they ruined the railroads. However, as argued here, the economic aspects of the Railroad were only part of the problem, and the regulation directly addressed economics. No effort was made, or perhaps could be made, to deal with the fundamental problem, the disappearance of any authority to curb the materialistic enthusiasms that the railroads promoted in order to make money; or, more broadly expressed, the lack of any societally-supported alternative to capitalism and consumerism. Thus, whether the Granger Laws made "economic sense or were even effective is not the issue here. It does not capture the cultural meaning of these laws to describe them in purely *economic* terms."<sup>137</sup>

## B. THE 20TH CENTURY RESPONSE.

Our response to the "Modern Problem" has not been very successful either. Again, it is suggested that the problem was, and is, threefold: the triumph of big business over small, the erosion of traditional values, and the celebration of materialism and consumption, with concomitant environmental destruction.

### 1. Antitrust Laws

Antitrust laws, fraught enough with difficulties and self-contradictions,<sup>138</sup> are the tool of choice for dealing with "big business over small." However, they are not rigorously enough imposed to do more than curb the most egregious abuses (though they are better than nothing).<sup>139</sup>

137. LEACH, *supra* note 91, at 268. Harvey Cox said "the market's first commandment is there is never enough." Cox, *supra* note 29, at 290.

138. FRIEDMAN, *supra* note 6, at 66.

139. Judge Learned Hand famously observed, "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. ALCOA*, 148 F.2d 416, 430 (2d Cir. 1945).

2. *The Reassertion of Traditional Values*

Conservatives worry, and not without reason, about the erosion of traditional values, individualism run amok: abortion rights, divorce rights, affirmative action (as part of the civil rights movement) gay rights, the right to die, the right to use marijuana, and so on. This concern may represent some progress in a way: at least the conservatives focus social and cultural problems, not exclusively on economic ones, and some efforts have been made to curtail "excessive" license.<sup>140</sup> For the most part, these gestures are at the grass-roots level are ridiculed.<sup>141</sup> And insofar as

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140. "Faced with potentially hostile judges, the executive branch has traditionally deliberated very carefully before launching a criminal antitrust action. 'The Justice Department, as an institution, is extremely conservative,' Philip Verveer, a former government lawyer [says]." Cassidy, *supra* note 18.

141. In 1993 public criticism of "gansta rap" part of a "budding national backlash against explicit rap music" convinced a number of broadcasters to censor themselves. It seemed that every second piece of legislation coming out of the 1994-96 Congress had "decency" or "family" in its name, including the instantly infamous "Communications Decency Act of 1996." Scott Armstrong, *Backlash is Brewing Over 'Gansta Rap' Lyrics as Public Says 'Enough'*, CHRISTIAN SCI. MONITOR, Dec. 13, 1993, at 1.

In April 1997 the TV actress Ellen Degeneres attracted nationwide media attention by "coming out" as a lesbian on her television program; the ABC affiliate in Birmingham Alabama refused to air the episode. (A more promising approach than censorship to concerns about sex and violence on television might be suggested by the television networks' decision in 1996 to create their own system of ratings that would alert viewers, particularly parents, to violence, sex or coarse language in programming. When technology permits, parents or other viewers could use these ratings in combination with the proposed v-chip, to be installed in most TV sets, to block programming they find objectionable. Would the "v chip" censor *Ellen*, a program with no sex or violence, but which discussed a current social issue of some importance and which used the word "gay"?). And a Charlotte, N.C. county commissioner was "besieged with thank you notes from constituents cheering his vote to stop funding groups that expose the public to homosexuality." Elizabeth Levitan Spaid, *Conservative South Clashes with Open Homosexuality*, CHRISTIAN SCI. MONITOR, Apr. 30, 1997, at 3. The Disney company, parent of the ABC television network, was boycotted by Southern Baptists in protest over its gay-friendly company policies and the publication, by one of its subsidiary record companies, of records with obscene lyrics.

The resolution agreed to by the Southern Baptists here last week condemned Disney for extending benefits to the same-sex partners of its employees. But many Baptists admit the convention's beef with the entertainment giant is largely driven by the content of TV shows and movies it produces - including the film "Pulp Fiction" and the ABC sitcom "Ellen."

Sam Walker, *Boycotts: New Tool in Moral Crusades*, CHRISTIAN SCI. MONITOR, June 23, 1997, at 3.

A few days later, Disney announced it was recalling an estimated 100,000 copies of a new, obscenity-laced album from store shelves. The Baptists claimed a victory for family values. Michelle Dearmond, *Disney Pulls Hip-Hop Album*, ASSOCIATED PRESS, June 27, 1997, available at 1997 WL 4875540. Always the on-off switch remains available.

Judge Roy Moore, a circuit judge in Gadsden, Alabama was praised by over 6000 people at a prayer rally for his refusal to remove from his courtroom wall a hand-carved tablet of the Ten Commandments. His stand against "the assault on religious beliefs" was equally condemned by those who argued he and the state have no right to promote religious beliefs. Elizabeth Levitan

they tread on our cherished individualism, they are unlikely to be successful:

Individualism is an historic force and not a formal argument . . . . It is bound up in the emancipation of the worker from the restraints of serfdom, in the evolution of property, in the assertion of intellectual liberty, in the development of popular government and all that goes to make up a society adjusted to the idea of autonomy and spontaneity . . . . It is the sweep of modern history.<sup>142</sup>

Nor have political leaders, conservative or otherwise, been effective in showing a good response. It may appear that 19th Century politicians imposed constraint on the railroads (and on big business in general) to bring about the end of *laissez faire*; one might think, that if it could be done 100 years ago, it can be done today. But politicians did not impose much; they followed the interests of industry and the dictates of popular demand<sup>143</sup> and - as suggested here - were generally not successful. Today, politicians who propose doses of the bitter medicine of self-restraint or who suggest that there should be some limits on any "culture's" freedom of expression or consumption are generally not popular; they are considered "politically incorrect," laughable, old-fashioned,<sup>144</sup> meddling, or

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Spaid, *Thou Shalt Not Stop Praying in This Judge's Courtroom*, CHRISTIAN SCI. MONITOR, Mar. 4, 1997, at 1.

The reaction to "casual Friday" business attire has been observed; businesses "need to define what casual means, what is acceptable and what is not. *Id.* That is, there needs to be some assertion of authority over business dress. Sahm, *supra* note 129.

142. If they are not unconstitutional, however, the Communications Decency Act of 1996 was declared unconstitutional by the Supreme Court. *See Reno v. American Civil Liberties*, 117 S. Ct. 2329 (1997). Judge Moore cannot be doing much to improve Alabama's image as a backwater of ridiculous narrow-mindedness, and many people from outside the South roll their eyes at ham-handed censoring of television, thinking that this is simply more of the same antediluvian mentality that caused Southern police to hose down civil rights marchers in the sixties, more of the same "great tradition of doing things the same way we have always done them." Elizabeth Levitan Spaid, *Dixie Politics: Boys Clubs Still Prevail*, CHRISTIAN SCI. MONITOR, June 10, 1997, at 1 (quoting a male Southern politician).

143. ADAMS, *supra* note 48, at 142.

144. There were a large number of people - farmers and the working class in the nascent labor unions - who wanted constraints imposed on the roads; by 1886 the idea of imposing constraints on the railroads was not unpopular, not against popular opinion. Riots in the streets may be helpful in focussing government attention on a problem, and in the 1880s riots led to the formation of government commissions to consider and, if feasible, address the causes of popular unrest. What the railroads had been doing was perceived by the public not to be in the public interest; the self-interest of the magnates was perceived not to be in the public interest.

As Kolko convincingly demonstrates, the railroad bosses themselves wanted government regulation; they saw themselves that what they had been doing was not in their own interest:

The Great Strike of 1877 pointed to the danger of attacks on the railroads, not merely from the workers . . . but from the states and the Granger movement. The hostility of workers and farmers, many of whom controlled state politics, pointed to the possibility of local attacks which threatened to dislocate railroad systems that were regional, if not national, in their scope. Federal railroad regulation appeared to many railroad leaders



dangerous, and have a hard time getting elected or re-elected.<sup>145</sup> Moreover, even if politicians did have the courage to propose any significant curtailment of individualism, it would be no more acceptable or successful than it has been by those conservatives working at the grass-roots level.

So it seems clear that an attempt to impose culture, standards, or ethics is not going to work either from below or from above. No public philosophy of a “decent” culture has ever been imposed by fiat in a free society (Prohibition failed spectacularly), and there is no clear public agreement about what constraints should be imposed; there is no agreement as to what values should be promoted besides free enterprise.<sup>146</sup> American free enterprise, which seems to be particularly cherished by those conservatives most offended by its licentious manifestations, is inexorably tied up with license as has been suggested above.<sup>147</sup> No one

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as a safe shield behind which to hide from the consequences of local democracy, as well as a means of solving their own internal problems . . . . [T]he railroads . . . supported the basic principle and institution of federal regulation [a]nd enthusiastically worked for its extension and for the supremacy of federal regulation over the states.

KOLKO, *supra* note 49, at 41, 232.

The railroads’ general position was that “many of the leading railway managers admit the justice of [the ICCA’s] . . . terms and join in demand for its passage. The irregularities that have gradually crept into [the railroad system], got beyond their capacity to manage.” *Id.* (quoting the *Chicago Inter-Ocean*, Jan. 2, 1887).

145. Or they are almost apologetic. Brian Baird, a candidate for the U.S. Congress from the 3rd District in Washington State, said in his kick-off speech: “[A]nd I know this may be controversial, but it won’t cost us a penny more in taxes - the single most important step we need to take right now is to turn off the darn television . . . a device that spews meaningless garbage. We have an entire generation that has been trained not to think critically about the information that bombards them.” Brian Baird, *Campaign Kickoff Speech, Strategies: The Washington State Democratic Party* [NEWSLETTER], 5/1 (1997) at 6.

146. With exceptions so rare that they are regarded as miracles and freaks of nature, successful democratic politicians are insecure and intimidated men. They advance politically only as they placate, appease, bribe, seduce, bamboozle, or otherwise manage to manipulate the demanding and threatening elements in their constituency. The decisive consideration is not whether the proposition is good but whether it is popular - not whether it will work well and prove itself but whether the active talking constituents like it immediately . . . .

LIPPMANN, *supra* note 20, at 27.

147. For example, should our society allow its citizens, in their public interaction and via our airwaves, to speak languages other than English? Should we allow doctor-assisted suicide, research into cloning humans (the acceptance of human cloning has gained ground remarkably. It seems very unlikely that calls for caution [will be] . . . enough to stop lab research once it has begun. And here again is a new technology, morally neutral itself, with disturbing ethical implications about which we are “never saying, ‘Maybe we should put up a red light.’” Illinois physicist Richard Seed makes a persuasive case for developing the technology: there is market for it; it will make money. Robert Marquand, *Cloning Bolts Ahead . . . Toward People?*, *CHRISTIAN SCI. MONITOR*, Jan. 22, 1998, at 4. “Normal” homosexuals on television, “gratuitous” violence on television (the fall 1998 television lineup featured a new show, the premise of which was “revenge for hire”), the Ten Commandments on the courtroom wall, death as a penalty for some crimes? What about clear cutting in public forest lands, limits on the freedom to extinguish endangered species, or restrictions on taking salmon, or whales, or sharks? Cigarette advertis-

wants throw the baby out with the bath water or kill the goose laying the golden eggs, least of all conservatives. The economic policies conservatives promote tend to create the social circumstances they deplore.

Individualism swept modern history because, at one time, "equity and progress, both social and political, resulted from its influence."<sup>148</sup> One hundred years ago it became apparent that unrestrained economic freedom was not in the general interest, because it was possible with the industrial revolution, and more specifically, with the *development of steam transportation* for the self-interested economic activities of a few (J.D. Rockefeller, Jay Gould, James J. Hill) to affect the general interest, and because those adversely affected literally rioted in the streets. The rules of industrial conduct, formulated under the conditions of the 18th Century, failed to take into consideration important facets of industrial life. Those rules were changed. Again, we are at the point where the self-interested economic activities of a few (and of many who must compete with them) affect the general interest, where the rules of post-Enlightenment conduct (lack of trans-personal authority or restraint) fail to take into consideration important facts of post-industrial life (that personal restraint is necessary for a decent society). The problem is aggra-

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ing, decriminalized marijuana use, no-fault divorces? In late June of 1997 the state of Louisiana adopted an alternative kind of marriage, called "covenant marriage." When people exchange vows under this system, their marriage can be dissolved only for adultery, a spouse's conviction on a felony charge that brought the death penalty or a sentence of hard labor, physical or mental abuse, or abandonment. The only exception would be a two-year separation without reconciliation. The law marked a first victory for conservative Christians who have been campaigning to rewrite or overturn states' no-fault divorce laws, which they say undermine family stability. *Covenant Marriage Law Approved by Louisiana*, REUTERS NEWS SERVICE, July 7, 1997. The wags, of course, had at it immediately, wondering if couples in proposal's moments of exquisite happiness would not take disturbing pause at the sobering necessity to make a choice between *real* marriage and "marriage lite" (the old, no-fault marriage). And although the law's requirement of pre-marital counseling is no doubt a good thing, it does seem that "returning to the bad old days of difficult divorce" where one spouse had actually to sue the other and prove that he or she did one or more rather terrible things

would be a boon to lawyers without necessarily saving marriages or protecting women from Donald Trumps trading in old models for newer ones. How many cooing couples who select covenant marriage realize that should their union turn into an icy hell, they have signed on to a financially draining, emotionally exhausting divorce process . . . .

Margaret Carlson, *Till Depositions Do Us Part*, TIME, July 7, 1997, at 21.

148. See *supra* text accompanying note 119.

Personal behavior was [in the 19th Century] subject to a level of social monitoring, to norms of respectability and to sanctions of ostracism and stigma that are unknown among us. Both neighbourhoods and churches were small, slow moving face-to-face societies in which such sanctions were real and telling . . . . [Today] the culture of marriage and family is permeated by ideals of choice and self-fulfillment of the sorts celebrated by latter-day defenders of the free market. And, as I have noted, the fragmentation of family life which contemporary conservatives bemoan is, in very large part, a product of the culture of choice, and the economy of unfettered mobility, which they themselves promote.

GRAY, *supra* note 23, at 110-11.

vated and compounded by the relentless pressure to consume. Individualism has been perverted, and has become the thrall of big business.

### 3. *The Triumph of Materialism*

The third aspect of the Railroad Problem that is unresolved is the triumph of materialism. This problem too seems intractable. Would not our economy crumble if people stopped consuming? Possibly not.<sup>149</sup> Some people rebelled against this materialism, but for the most part these people are not taken seriously. If a person says he does not watch television he is looked at strangely, people who advocate a “green” philosophy are not in positions of authority, and those who really give up the “comforts” of modernism are thought bizarre, or insane.<sup>150</sup>

Why are we not rioting in the streets? Because the Enlightenment convinced that us it is in our interest to be free of most constraints, material and cultural, and to exploit the earth for material gain. This conviction is consciously fostered by producers to promotion consumption, and we are lead to appreciate, protect, and admire those who most directly satisfy our interest in self-satisfaction and consumption. We do not associate our malaise with its truest source. Self-satisfaction or gratification has become the new reality, the touchstone upon which the things of our society are measured.

Self-satisfaction, though, has no limit; it has no external or limiting reality. Bertrand Russell wrote

The concept of “truth” as something dependent upon facts largely outside human control has been one of the ways in which philosophy hitherto has inculcated the necessary element of humility. When this check upon pride is removed, a further step is taken on the road towards a certain kind of madness - the intoxication of power . . . to which modern men . . . are prone. I am persuaded that this intoxication is the greatest danger of our time, and that any philosophy, which however unintentionally, contributes to it is increasing the danger of vast social disaster.<sup>151</sup>

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149. ADAMS, *supra* note 48, at 142.

150. Thoughtful alternatives to our consumer-oriented society *have* been considered. For a classic in the area see *ALTERNATIVES TO GROWTH: A SEARCH FOR SUSTAINABLE FUTURES* (Dennis L. Meadows ed. 1977).

151. Defense attorneys for Theodore Kaczynski, who later confessed to being the “Unabomber,” intended to show at his Sacramento trial that anyone who would choose to live in a one-room, “isolated cabin with no plumbing or electricity could not have the mental capacity to be executed for the crimes for which he stood accused.” Brad Knickerbocker, *Tracing Kaczynski From Cabin to Court*, *CHRISTIAN SCI. MONITOR*, Jan. 5, 1998, at 1. That is, it is considered persuasive, or at least probative, evidence a man is crazy that he has eschewed the trappings of modernity!

## VI. CONCLUSION

The idea once reigned that business should be unconstrained, that each person's self interest would, if pursued, work for the common economic good. The railroad experience taught the 19th Century that this idea was not necessarily correct. It was not "wrong" that a politically contentious people should come to despise and reject the railroad and make it "the chief scapegoat of their discontents"<sup>152</sup> - people *had* discontents, and the railroads, the foremost instrumentality of modernism, were a focus for them. But the 19th Century response to the problem was less than successful because the unconstrained pursuit of economic interest adversely affected the economy. This resulted from modern industrialism's unprecedented ability to magnify the railroad magnates' self interest and project it across the land. The real Railroad Problem was inherent in the roads' creation of a "culture of national commercial exchange" that strongly appealed to the American post-Enlightenment mentality eager for self expression, unfettered by constraining ideology, and open to new ideas; indeed, national commercial exchange became the new religion, and it has squeezed out all the other informing interests.

Experience is now teaching us that we still have a Railroad Problem. The ability of modern electronic media to magnify corporate interests and project them across the land, combined with the constant insistence by most of our influential institutions that national commercial exchange is the only broadly acceptable societal purpose, has shrunk the non-materialistic options within reach to those that at base cannot satisfy us. There is nothing wrong with materialism, unless its allure is never challenged by any respectable alternatives. Even in the face of an increasingly "vast

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152. See *supra* text accompanying note 3. Thoreau wrote:

Men think that it is essential that the Nation have commerce, and export ice, and talk through a telegraph, and ride thirty miles an hour, whether they do or not; but whether we should live like baboons or men, is a little uncertain. If we do not get out sleepers [wooden railroad ties], and forge rails, and devote days and nights to the work, but go to tinkering upon our lives to improve them, who will build railroads? And if railroads are not built, how shall we get to heaven in season? But if we stay at home and mind our business, who will want railroads? We do not ride on the railroad; it rides upon us. Did you every think what those sleepers are that underlie the railroad? Each one is a man, an Irishman, or a Yankee man. The rails are laid on them, and they are covered with sand, and the cars run smoothly over them. They are sound sleepers, I assure you. And every few years a new lot is laid down and run over; so that, if some have the pleasure of riding on a rail, others have the misfortune to be ridden upon. And when they run over a man that is walking in his sleep, a supernumerary sleeper in the wrong position, and wake him up, they suddenly stop the cars and make a hue and cry about it, as if this were an exception. I am glad to know that it takes a gang of men for every five miles to keep the sleepers down and level in their beds as it is, for this is a sign that they might sometime get up again.

HENRY DAVID THOREAU, *WALDEN, OR LIFE IN THE WOODS* 82 (Alfred A. Knopf pub. 1992).

social disaster”<sup>153</sup> - the ruination of the environment - we are loath to reimpose any major constraints on ourselves, to set any significant ethical or cultural standards for the creation of a decent social structure. Heaven knows, anything goes.

The Railroad Problem still exists. What are we to do?

Our political leaders cannot impose decency upon us. Perhaps our teachers, business people, political leaders, those with the inclination to reflect on such things, could agree to honestly discuss the erosion of our standards; perhaps we could agree to face front-on our progressive barbarization, its descent into violence and ugliness and crassness.<sup>154</sup> The railroad abuses born of laissez faire were, by the 1880s, apparent to almost everyone (including the railroad bosses). The relationship between today’s dissatisfactions - that we “feel glum about the nature and future of our civilization”<sup>155</sup> - and today’s cultural laissez-faire need to be made apparent, played up, noticed.<sup>156</sup>

Advocates for some principles of decency should not be intellectually discredited; these principles and their discussions should not be dismissed out of hand as superstition, obscurantism, meaningless metaphysics, reactionaryism, self-seeking rationalizations, narrow-mindedness, politically incorrect, chauvinistic, intolerant, elitist, culturally imperialist, anti-business, or protectionist.<sup>157</sup> In our public discussions we

153. See *supra* text accompanying note 148. It is apparent that we cannot, for example, go on indefinitely expanding our population and paving over the planet.

154. Look in the telephone book yellow pages under “Attorneys” and see if the profession has not, in general, degenerated into a crass, sordid business.

155. See *supra* note 10 and accompanying text. It still takes a gang of men for every five miles to keep the sleepers down.

156. The death of Diana, Princess of Wales, at least focussed some attention on the corrupting and degrading influence of one of the most demoralizing aspects of popular culture, the tabloid press. As Henry Carter Adams said, the strange thing is not that we recognize how unacceptable free license was one hundred years ago, the “strange thing in the situation is that, while this is easily seen with regard to controversies of the past, it is with difficulty appreciated when a controversy that touches our lives is the subject of the analysis.” See *supra* note 48 and accompanying text. It is also heartening to see some restrictions now being imposed on one of the most offensive neighborhood-noise makers, the leaf blower. In California, 44 cities have enacted restrictions on blowers, including Beverly Hills, Santa Monica, Dana Point, Laguna Beach, South Pasadena and Claremont; the obnoxious machines have been banned from Berkeley since 1990, and in Los Angeles their use is to be highly restricted as of January 1, 1998. Limitations on leaf blowers have also been effected in Scarsdale, Oyster Bay, and North Hempstead, New York. Winnetaka, Illinois defines the use of gasoline-powered leaf blowers at certain times of the day to be a public nuisance. Ted Rueter, *Shh! Can You Turn Down that Leaf Blower?*, CHRISTIAN SCI. MONITOR, Oct. 3, 1997, at 19.

157. Part of the problem here is that the advocates of a “decent” society are very often perceived to be the most reactionary and oppressive troglodytes. Internationally we have seen the Chinese “cultural revolution” of the 1970s, the horrors of the Khemer Rouge, the repressive fundamentalism of Muslim rulers in Iran and, more recently, the Taliban in Afghanistan; we know what kind of society resulted from the old Soviet Union’s efforts to discourage “decadent”

need to stop feeling that we should apologize for saying things are going to hell in a handbasket, that some aspects of modern culture are unacceptable, that there is something wrong with letting people "vote with their dollars" when the rich can buy more "votes" than others, that some peoples' "cultural" manifestations (for the most part promoted by advertising) are so injurious to the general society as to be unacceptable, that while all men may be created equal, not all cultures are, even if that expression offends some people's sensibilities.

Even if we recognize the social disaster already upon us and allowed some honest discussion of the problem, it would still be difficult to articulate any broadly acceptable principles upon which we could all agree,<sup>158</sup> much less impose. For here we tread on dangerous ground in a democracy<sup>159</sup> - we intimate the imposition of some standards.

It is not necessary for our institutions to impose "decent values" upon us, it cannot, and should not, be done. It would be a good start if we stopped actively promoting, at home and world wide, values of commercialism and consumerism that too easily fill the void caused by the disintegration of traditional values. Where is it written in the Constitution that the business of government is business? This is not to denigrate business or the International Monetary Fund, but only to give other phi-

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behavior and today we watch with a horrible fascination at the bizarre goings-on in North Korea. Even the effort of the French establishment to discourage the invasion of American culture seems odd, at least. See generally Mark Clayton, *It's "Piano" vs. "Jurassic Park" in Movie Joust*, CHRISTIAN SCI. MONITOR, Feb. 7, 1996, at 14 (describing the French Ministry of Culture's attempt to resist "the U.S. cultural invasion"). All of these societies promote their variously repressive regimes as protectors and defenders of decent culture and true values. In the United States "decency" is too often associated with its promotion by those who appear ignorant and narrow-minded, most especially by the uncharitable, unattractive repressiveness of the religious right who are correct to emphasize "family" values, but too narrow-minded to appreciate that a "family" may be something other than their traditional fantasy.

158. Could we agree that our suburban landscape is truly ugly and demoralizing, and assent to a significant increase in the gasoline tax to fund public transit and to pay landowners for aesthetic improvement? Is it yet beyond the pale to assert that the environment should have some legal rights? See, e.g., Warner, *supra* note 21, at 455 (the article includes some review and argument on whether, to use Christopher Stone's famous phrase, "trees should have standing"; if environmental entities had legal rights independent of the entities' usefulness to us, we would be constrained by a non-human limitation). If giving legal rights to the environment is unacceptable, we could perhaps promote "environmental accounting," the idea that businesses should account, in their books and records, for the negative externalities of their operations and be required to ameliorate them over time. Or could we agree, say, that children should not be born out of wedlock? And once that was agreed we might craft laws and regulations to discourage illegitimacy. Maybe we could agree that everyone should graduate from high school and learn a marketable trade.

159. It has recently been suggested that democracy is just a moment, and that future governments, including our own, will become some kind of corporate/government oligarchic hybrid. See, e.g., Robert D. Kaplan, *Was Democracy Just a Moment*, ATLANTIC MONTHLY, Dec. 1997, at 55-80 (discussing the evolution of governments into democratic entities and whether this is permanent).

losophies an opportunity to flourish. Let us consumers look capitalism squarely in the face;<sup>160</sup> make it take responsibility for what it has wrought, and have business compete fairly for the affections and loyalty of a truly free people. We could disassociate the state from business as we have from religion, and consider that government support of business is as harmful to us as we think government support of religion would be. Free enterprise is not the same as active governmental promotion of capital accumulation (capitalism). We have no Federal Department of Religion, but we have a Federal Department of Commerce, as well as, state-supported Colleges of Business, Chambers of Commerce, and whole panoplies of international, national, regional and local “boosterisms.”<sup>161</sup> Individualism is “an historic force”<sup>162</sup> that is not spent, but it is perverted when it is manipulated to the exclusion of other interests by the promoters of commercial exchange to make money. Let individualism roam more freely, not just among the brutal artifacts of modernity, but also in those quieter places where the values of community and charity are found.<sup>163</sup> No economic system lasts forever. The change would be revolutionary, but no more so than the railroad revolution itself.<sup>164</sup>

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160. “[T]he reformer Florence Kelley . . . demanded that consumers take responsibility for the world they lived in, that they look capitalism squarely in the face, and that they acknowledge the working people who make the goods and under what conditions.” LEACH, *supra* note 91, at 389.

161. Regarding “boosterism,” Washington State law provides that “It shall be in the public purpose for all port districts to engage in economic development programs.” WASH. REV. CODE § 53.08.245 (1998). It also provides that they may “expend moneys . . . to attract visitors and encourage tourist expansion.” WASH. REV. CODE § 53.08.255 (1998).

We could, for example reconsider tax treatment of advertising, government highway, rangeland, crop, and business-loan subsidies, export promotion, maintenance and dissemination of business statistics, to name just a few items. If the government, through its taxes and subsidies, allowed the price of gasoline to reflect its true “price” to society (if we internalized the externalities for motor vehicles), Norman Myers of Oxford University estimates that gasoline would cost \$7-10 a gallon. Don Mayer, *Automobiles, Consumption and the Environment*, 3/1 ENVIRONMENT AND BUSINESS NEWSLETTER, ACADEMY OF LEGAL STUDIES IN BUSINESS (May 1998) (quoting Mayer, *Consumption in Relation to Population, Environment, and Development*, Paper for Proceedings of the U.S. National Academy of Science (July 1996)).

162. See *supra* text accompanying note 141.

163. It is somehow gratifying to read that some countries around the world, alarmed by the disastrous economic consequences of the imposition of capitalism in 1998, are experimenting with “a less rigorous form of free enterprise,” though the experiments are so far limited to restricting the free flow of capital. David R. Francis, *World Cools to Capitalist Ideals*, CHRISTIAN SCI. MONITOR, Sept. 17, 1998, at 1.

164. A valuable analysis of some, many, of the ways government supports and promotes business at the expense of public welfare was presented in a four-part series in *Time*. Donald L. Barlett & James B. Steele, *What Corporate Welfare Costs You*, TIME, Nov. 9, 1998; Donald L. Barlett & James B. Steele, *Corporate Welfare: How the Feds Play the Game*, TIME, Nov. 16, 1998; Donald L. Barlett & James B. Steele, *Corporate Welfare: The Polluters*, TIME, Nov. 23, 1998; Donald L. Barlett & James B. Steele, *The Empire of the Pigs, and Five Ways Out*, TIME, Nov. 30, 1998. Ending “corporate welfare” would be a step, a revolutionary step, in the right direction.

